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No. 92-419

IN THE

Supreme Court of the United States

ADMINISTRATOR OF THE NEW YORK CITY DEPARTMENT OF HUMAN RESOURCES, *et al.*,

Petitioners,

- against -

ABBOTT HOUSE, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 1, 1992

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QUESTION PRESENTED

May attorney's fees be awarded pursuant to 42 U.S.C. § 1988 to intervenors whose rights have not been violated, to be paid by a defendant who has done that party no wrong?

PARTIES

Petitioners are the Administrator of the New York City Human Resources Administration; the former Administrator, Blanche Bernstein in her individual capacity; The City of New York; The New York City Department of Social Services; Beverly Sanders individually and in her former capacity as Administrator of Special Services for Children;[1] Carol Parry, Elizabeth Beine, and Linda Marino, individually and in her former capacity as Director of the Office of Allocations and Accountability of Special Services for Children, Paula Rabinow, individually and in her former capacity as Director of the Joint Planning Service, Sandra Howard, individually and in her former capacity as Supervisor of the Central Referral Unit and the Comptroller of the City of New York.

Respondents are Abbott House, Berkshire Farm Center & Services for Children, Brooklyn Home for Children, Brookwood Child Care, Episcopal Mission Society, Green Chimneys Children's Mission Service, Heartsease Home, Inc., Inwood House, Lakeside School, Louise Wise Services, Lutheran Community Services, Puerto Rican Family Association, St. Christopher-Jennie Clarkson Child Care Services, Sheltering Arms Children's Service, Society for Seaman's Children, Spence Chapin Services to Children, Talbot Perkins Children's Services, The Children's Aid Society and The Children's Village.

None of the plaintiffs below and none of the defendants below except the City of New York, its agencies and its employees are parties to this proceeding.

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[1] The New York City agency Special Services for Children no longer exists; its functions have been replaced by the Bureau of Child Welfare.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, the Administrator of the New York City Department of Human Resources, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on June 3, 1992, which, upon reargument, vacated its previous judgment and ordered payment of attorneys' fees to the respondents.

OPINIONS BELOW

The opinion of the Court of Appeals on reargument has not yet been reported. It is reprinted in the Appendix at A-1. The prior opinion of the Court of Appeals, which reversed the District Court's award of fees and gave judgment to petitioners is reported at 944 F.2d 1028. A copy is reprinted in the Appendix at A-23. The opinion of the United States District Court for the Southern

District of New York (Ward, J.) is reported at 725 F. Supp. 1324 and is reprinted in the Appendix at A-45.

JURISDICTION

The District Court ordered petitioners to pay attorneys' fees to respondents by judgment dated June 29, 1990 (A-51). The Court of Appeals reversed and dismissed the application for attorneys' fees by judgment and decision filed September 24, 1991 (A-26). On timely application for reargument, the Court of Appeals on June 3, 1992 vacated its prior opinion and issued a new opinion remanding this matter to the District Court for calculation of the fees (A-1). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A group of black Protestant children challenged the constitutionality of New York City's foster care system in *Wilder v. Bernstein* in 1973. The plaintiffs claimed, *inter alia*, that the City's system of offering the bulk of its foster care through placements with private, religiously affiliated agencies discriminated on the basis of race and religion and violated their rights to free exercise of religion. The defendants included New York City and the religiously affiliated child care agencies. The plaintiff class was certified in 1980 with the New York Civil Liberties Union Children's Rights Project representing the class. *Wilder v. Bernstein*, 499 F. Supp. 980 (S.D.N.Y. 1980).

After ten years the City and plaintiffs negotiated a settlement of the litigation. The defendant private child care agencies objected to the settlement, as did respondents, a group of non-sectarian child care agencies. None of the respondents were parties to the litigation although some had been defendants at an earlier point in the proceedings.

Respondents wrote the Court in 1984 asking that they be allowed to intervene (JA-403).[2] Respondents did not specify whether they sought to intervene as plaintiffs and did not file a complaint. The District Court ordered that "the intervenors are hereby made parties to this cause for the limited purpose of opposing the proposed settlement now pending before this court..." (W-43). Judge Ward later characterized the intervenors' participation as limited to clinical issues: "[T]he intervenors ... joined the lawsuit for the sole purpose of objecting to the Stipulation on clinical grounds." *Wilder v. Bernstein*, 645 F. Supp. 1292, 1350 (S.D.N.Y. 1986).

The intervenors' clinical objections were numerous. They included the proposed system for ranking child care agencies according to their quality of care, the City's authority over referral of children for placement, and the increase in already burdensome paperwork. These clinical objections were described in 91 pages of the intervenors' legal memoranda (JA-33-81, 96-137) and voluminous affidavits (W 1643-1900). The agencies also argued that one aspect of the settlement would unconstitutionally deprive foster children of their First Amendment rights (JA 70-76, 133-36). The same arguments were raised by the defendant sectarian child care agencies (W 1609-13).

The intervenor and defendant agencies joined the negotiations, using the intervenors' proposals as a negotiating basis, and a final settlement agreement was

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[2] Citations to the Appendix to this Petition are preceded by "A". Citations to the Joint Appendix submitted to the Second Circuit Court of Appeals are preceded by "JA". Citations to the Joint Appendix submitted to the Court of Appeals in connection with the appeal from the consent decree embodying the *Wilder* settlement are preceded by "W".

reached. 645 F. Supp. at 1347-48. The District Court described the result:

> The general outlines of the Stipulation now before the Court do not differ greatly from those of the original settlement.... Within this broad outline, however, the Stipulation reflects numerous changes ... that address virtually all of the concerns raised by the intervenors and other child care administrators and clinicians who commented on the original settlement proposal.

645 F. Supp. at 1348.

In a lengthy opinion explaining why it approved the *Wilder* settlement, the Court emphasized that it had found the intervenors' participation important precisely because the intervenors had no legal interest at stake in the litigation. Judge Ward quoted the intervenors' own papers to emphasize their exclusively clinical concerns:

> As the intervenors attested, they '[had] no axes to grind.' ... Their expressed purpose was to measure the settlement proposal against the 'sole standard' they considered relevant -- whether it furthered the best interests of children in foster care.

645 F. Supp. at 1346-47. The Court also emphasized that the intervenors had no interest in the legal dispute between the parties:

> [Because the intervenors were] nonparties vis-a-vis the underlying constitutional claims in the lawsuit, [they] are the sole participants in this litigation who have been in a position to address freely and undistractedly ... child care concerns....

Wilder v. Bernstein, 645 F. Supp. at 1350.

The District Court entered the settlement as a consent decree, over the objection of the defendant agencies, and the Court of Appeals affirmed the settlement. *Wilder v. Bernstein*, 848 F.2d 1338 (2d Cir. 1988).

The intervenors moved pursuant to 42 U.S.C. 1988 for the City to pay their attorneys' fees in 1989.[3] The City argued in opposition that the intervenors were not a prevailing party because they had no federal constitutional or statutory rights at stake in the litigation. By judgment dated June 29, 1990, the District Court ordered the City to pay the intervenors over $365,000 in fees and disbursements (JA-450).

The District Court Opinion

The District Court held that because the intervenors "facilitated the formation of a settlement which would safeguard the constitutional rights of the children in the city's care, while assuring that the child care system itself would remain focused on the overall best interests of the children entitled to the protection of the civil rights laws," their attorneys' fees were compensable. 725 Supp. at 1331. Additionally, the Court reasoned that the intervenors had raised objections addressed to constitutional and civil rights issues and many of the modifications they obtained in the settlement proposal "went directly to benefit the children in the child care system." The Court concluded that the intervenors were entitled to fees because they had "helped to vindicate the civil rights of the children and families in the foster care system..." *Id.* at 1332.

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[3] The City paid plaintiffs' attorneys $1,775,00 in fees and costs for their work up to that point. *Wilder*, 725 F. Supp. 1324, 1327, n. 2. Payments continue to date for work on enforcement of the consent decree.

The First Opinion of the Second Circuit Court of Appeals

The Second Circuit Court of Appeals reversed, in an opinion by Judge Cardamone, with Chief Judge Oakes dissenting. The Court held that 42 U.S.C. § 1988 only authorized payment of fees to parties asserting their own civil rights:

> Legislative history supports the view that though intervenors may be prevailing parties, it is only when they assert their own civil rights that they are so considered. Congress planned on having § 1988 serve as a mechanism for vindicating the rights of those whose civil rights had been violated, not for forwarding civil rights in general.

944 F.2d at 1033.

The Court noted that respondents' interests were vitally affected by the proposed *Wilder* settlement and that they did not need the incentive of a fee award to become involved in the litigation:

> [N]o member of the intervenor group has asserted any civil rights interests of its own. Instead, intervenors became involved initially in the instant litigation because of their fear both that administrative burdens imposed by the original proposed settlement would make the foster care system even more unworkable than the record shows it presently is, and also give rise to those clinical concerns that the list of intervenors' objections in the trial court reveals, *see* 645 F.Supp. at 1346-47. On that score alone intervenors would doubtless have entered the settlement negotiations regardless of whether attorney's fees were available.

944 F.2d at 1034.

The Court rejected the argument that the intervenors were entitled to fees because they acted to benefit children in foster care:

> [I]ntervenors cannot be said to be the legal custodians or guardians of the children in their care. That responsibility belongs to the appropriate City agency. *See* N.Y. Soc. Serv. Law § 383(2) (McKinney 1983 & Supp. 1991). Thus, it does not appear that intervenors are possessed of any interest that permits them to assert the civil rights of the foster children in their care and to be considered a prevailing party under § 1988.
>
> Finally, we agree with the district court that appellees' efforts were beneficial to the children whose rights were at stake, but the City's earlier nearly two million dollar payment for plaintiffs' attorney's fees was for services that also vindicated the constitutional rights of Protestant Black children, the same constituency intervenors seek to be rewarded for representing.

944 F.2d at 1034.

The Second Opinion of the Court of Appeals

On reargument, the Court vacated its first opinion and held that the intervenors were entitled to a fee award. The Court found no requirement in section 1988 that the prevailing party be asserting its own civil rights. The Court noted that the legislative history of 42 U.S.C. § 1988 referred only to awards of fees to parties asserting their own civil rights but concluded (A-16-17):

> The omission of a reference in that history to the rights of third parties, those permitted to assert the rights of others through the law of *jus tertii*, or associational standing, is not dispositive....

> The legislative history does not express an intent so clearly contrary to the statute that it can support a conclusion more limited than the ordinary meaning of the statutory language used, one, moreover, in conflict with the broad remedial purpose of § 1988. *See Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

The Court decided that the intervenors could be characterized as prevailing parties under section 1988 because the *Wilder* litigation (A-19):

> implicated interests or common legal or factual questions involv[ing] violations of civil rights protected by the Constitution or federal statutes enumerated under § 1988, and because the efforts of the intervenors contributed importantly to the creation of remedies Congress sought to advance in the fee statute

The Court remanded the fee award to the District Court to exclude "efforts by counsel for intervenors that merely duplicate those of the plaintiffs in effectuating the foster care children's civil rights" (A-19-20). For the future, the Court cautioned that work done by "parties whose intervention produces results that are unrelated to remedying violations of civil rights are not eligible for fees" (*id.*). However, once intervenors raise a civil rights argument, they are entitled to fees even though they would have participated in the litigation for non-civil rights reasons (A-21): "[W]here a party has mixed motives for intervening..., the non-duplicative attorneys' fees attributable to the efforts expended in pursuit of civil rights remedies may be recovered."

REASONS TO GRANT THE WRIT

1. AWARDING ATTORNEYS' FEES TO INTERVENORS WHOSE RIGHTS WERE NEVER VIOLATED CONFLICTS WITH THIS COURT'S DECISIONS BY BREAKING THE CONNECTION BETWEEN LIABILITY ON THE MERITS AND LIABILITY FOR FEES. THE ADOPTION OF THIS RULE WILL ENGENDER UNNECESSARY COMPLEXITY IN CIVIL RIGHTS LITIGATION AND BURDEN PUBLIC TREASURIES WITHOUT ADVANCING THE PURPOSE OF THE ATTORNEYS' FEES ACT.

The rule announced by the Second Circuit authorizes an award of fees to a party even though the party does not claim that the defendant violated its rights. This breaks

> the crucial connection between liability for violation of federal law and liability for attorney's fees under fee-shifting statutes.

Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754, 762 (1989). Having unmoored liability for fees from liability on the merits, the Second Circuit has turned 42 U.S.C. § 1988 into a vehicle for the advancement of civil rights interests in general, even though the party awarded a fee did not have its civil rights violated and even though the defendant is innocent of any wrongdoing to the party awarded the fee.

The opinion below recognizes the confusion likely to be created by this novel interpretation of the statute. Intervenors will be able to piggyback onto existing civil rights litigation and argue that the defendant must pay their fees, even though they do not claim that the defen-

dant violated their rights (A-20). All it will take is the advancement of a constitutional argument on behalf of someone's interests, and the intervenor will be able to obtain fees for advancing its non-civil rights interests. *See* A-21 (instructing District Court to award fees for "mixed motive" work).

Institutional reform litigation commonly affects groups who do not have a claim that is covered by an attorneys' fee award statute. Mental health professionals have an interest in litigation over patients' right to refuse treatment, prison guards are interested in preventing inmates' exposure to tuberculosis and, as in the case at bar, private child care agencies are interested in litigation over discrimination in the foster care system. To date, it has been common for such groups to offer their expertise by participating as *amici*. *See, e.g., Jose P. v. Sobol*, 79 Civ 270 (E.D.N.Y.) (teachers' union has participated as *amicus* for over ten years in litigation over the provision of special education). The opinion below will stimulate such groups to air their grievances through intervention rather than by offering their expertise as non-parties, now that they can obtain attorney's fees. This will clutter the main litigation with non-civil rights issues and force the defendants to oppose the groups' participation, since the fee awards will certainly be costly, even though their participation might be beneficial to creation of a more practical remedy.

An award of fees to intervenors in civil rights litigation who lack a civil rights claim is contrary to the statutory language and legislative history. The Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, authorizes the award of fees to a prevailing party in actions to enforce the civil rights laws. Section 1988 was enacted in order to encourage "private citizens ... to be able to assert their civil rights...." Senate Report No.

1011 (1976) *reprinted in* 1976 U.S. Code Cong. & Admin. News 5910. *See generally Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983): "The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances." There is nothing in the statutory language or legislative history to authorize an award of fees to parties who do not sue "to assert their civil rights." Senate Report No. 1011 (1976).

The use of the term "prevailing party" presupposes that the party who prevails wins in his or her own interest, not on behalf of someone else. This Court has repeatedly held that fees may not be awarded for advancing the cause of civil rights in general. *See Rhodes v. Stewart*, 488 U.S. 1 (1988) (prevailing party must have obtained benefit for himself, insufficient to obtain benefit for others); *Hewitt v. Helms*, 482 U.S. 755 (1987) (prevailing party must have changed defendants' conduct towards him or her). Instead, this Court's opinions on the attorneys' fees statutes routinely assume that the parties seeking fees would be seeking reimbursement for the costs of vindicating their own claims. *See, e.g., Kay v. Ehrler*, __ U.S. __, 111 S.Ct. 1435, 1437 (1991) (purpose of section 1988 "was to enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights."); *Hewitt v. Helms*, 482 U.S. at 760 (to be a prevailing party plaintiff must "receive at least some relief on the merits of his claim").

It does not advance the purposes of the civil rights acts to award fees to intervenors without a civil rights claim. They have not been injured in any way that the civil rights acts seek to redress. *Compare Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968) (purpose of providing attorneys' fees is "to encourage individuals injured by racial discrimination to seek judicial relief"). The purpose of the attorneys' fees statute is served once

the plaintiffs bring their lawsuit; as long as the intervenors are not also suing to vindicate their own rights, their interest in the litigation is unrelated to the Congressional purpose of encouraging injured parties to seek relief and no fee award is proper. *See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975).

In the usual case intervenors without a civil rights claim of their own do not need the incentive of a fee award to be encouraged to join civil rights litigation. In this case, the first opinion by the Court of Appeals noted that the respondents "would doubtless have entered the settlement negotiations regardless of whether attorney's fees were available," 944 F.2d at 1034, since their institutional interests as foster care providers would be profoundly affected by a remedy that reworked the guidelines for the foster care system. Therefore, even as a practical matter, it is unnecessary to offer the carrot of a fee award to encourage the groups who might be affected by a potential remedy to join civil rights litigation.

Such intervenors may have an important contribution to make to the creation of a remedy, especially when the intervenors are neutral regarding the legal issues. In the merits stage of this litigation the District Court Judge characterized respondents' involvement as invaluable because "they '[had] no axes to grind'" and were "nonparties vis-a-vis the underlying constitutional claims in this lawsuit." 645 F. Supp. at 1346-47. No matter how valuable this contribution, however, it is not compensable under section 1988. That statute limits fee awards to parties who have an ax to grind, specifically to parties with a constitutionally based grievance.

In raising a constitutional argument on behalf of children in foster care, the same group comprising the plaintiff class, the agencies acted as volunteers. They did not represent a class of children; the children already constituted a class and had class counsel. *See Wilder v. Bernstein*, 499 F. Supp. 980 (S.D.N.Y. 1980) (certifying plaintiff class with the Children's Rights Project as class counsel). The intervenors did not represent parents of children in foster care; they never sought to represent this class' interests. Therefore any change they brought about in the settlement that advanced these groups' constitutional rights is not compensable. *See Hewitt v. Helms, supra.* Instead, they acted as litigating *amici* , presenting a legal argument to the Court on behalf of another.[4] Such a group's participation may be valuable, but without a compensable interest in the litigation, no fees should be awarded. *See Morales v. Turman*, 820 F.2d 728 (5th Cir. 1987) (no fees for *amici*).

2. THE OPINION BELOW CONFLICTS WITH THE APPROACH TO FEES FOR INTERVENORS TAKEN BY OTHER CIRCUITS.

The opinion below conflicts on two different grounds with the approach taken by other Circuits to fee awards for intervenors. First, other Circuits have held that fee awards to intervenors are subject to greater scrutiny than awards to plaintiffs. *See Donnell v. United States*, 682 F.2d 240, 247-49 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1204 (1983); *Posada v. Lamb County, Texas*, 716 F.2d 1066, 1074-75 (5th Cir. 1983); *American Booksellers*

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[4] Respondents represented themselves as more "akin to amici" than to parties in their brief defending the consent decree before the Second Circuit. Brief of Intervenors at 2.

Assoc., Inc. v. Hudnut, 650 F. Supp. 324, 332 (S.D. Indiana, 1986). The opinion below turns that doctrine on its head and awards fees to intervenors even though they could not obtain an award for advancing the same claim in an independent action. Intervenors should not have more liberal rights to recovery of attorneys' fees than plaintiffs.

Intervenors with a fee paying claim should be able to obtain fees because they would be entitled to them if they were to raise their claim in separate litigation. Accordingly, various Circuit Courts of Appeal have upheld awards of fees to intervenors who have a fee generating claim in the litigation. *E.g. Afro-American Patrolmen's League v. City of Atlanta*, 817 F.2d 719 (11th Cir. 1987) (intervening white police officers alleging racial discrimination awarded fees); *Commissioners Court of Medina County, Texas v. United States*, 683 F.2d 435 (D.C. Cir. 1982) (intervening Mexican-American voters alleging violation of Voting Rights Act awarded fees); *Seattle School District No. 1 v. State of Washington*, 633 F.2d 1338 (9th Cir. 1980), *aff'd on other grounds*, 458 U.S. 457 (1982) (intervening organizations defending school desegregation plan on behalf of members and their children awarded fees).[5]

This rationale is inapplicable to intervenors who lack an independent fee paying claim. If they were to bring an independent action, no fee award would be possible. *See Smith v. Robinson*, 468 U.S. 992 (1984) (prevailing party with claim under statute that does not provide for fee shifting may not be given attorneys' fee

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[5] The intervenor groups in *Seattle School District* were described by the District Court as including members with children in Seattle schools. The intervenors sued on behalf of those members and on their own behalf. *Seattle School Dist. v. State*, 473 F. Supp. 996, 1000 (W.D. Wash. 1979).

award); *Gagne v. Town of Enfield*, 734 F.2d 902 (2d Cir. 1984) (fee award not authorized for plaintiff who prevails only on non-fee generating claim).

Accordingly, the District of Columbia Circuit has imposed the requirement that awards to intervenors be based on a finding that the intervenors had a civil rights claim. *Miller v. Staats*, 706 F.2d 336, 342 (D.C. Cir. 1983). *Miller* was a Title VII employment discrimination suit brought by a class of black and female employees. The intervenors, a class of white male employees, joined the litigation to seek a revision of a proposed consent decree so that it did not discriminate against them. On appeal the court held that the intervenors could be awarded a fee if they "allege a claim that is colorable under the civil rights laws." In contrast, the Second Circuit has now upheld an award to intervenors even though they do not allege a colorable claim under the civil rights laws.

The Second Circuit's approach also conflicts with those Circuits that have held that before intervenors may be awarded fees, the court must determine whether the intervenors acted as plaintiffs or defendants. *See League of United Latin American Citizens v. Clements*, 923 F.2d 365, 367-68 (5th Cir. 1991) (*en banc*); *Reeves v. Harrell*, 791 F.2d 1481, 1484 (11th Cir. 1986). These Circuits have held that an intervenor's status must first be analyzed to determine whether the restrictive *Christiansburg* standard applies to their fee application. *See Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 422 (1978) (fees may not be awarded to defendants as prevailing parties unless the claim was "frivolous, unreasonable or groundless"). The Second Circuit instead ignored the question of the agencies' status in the litigation.[6]

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[6] The agencies never specified whether they were intervening as

(Footnote Continued)

If the court had analyzed the question, it might have been hard pressed to uphold the fee award; respondents opposed plaintiffs' position and the very same constitutional arguments raised by respondents were also raised by the defendant child care agencies (JA 70-76, 133-36, W 1609-13). Thus, by avoiding the question deemed determinative by the Fifth and Eleventh Circuits, the lower court never confronted the question of why respondents should be awarded fees for making the same legal arguments as the defendant agencies, without being held to the *Christiansburg* standard. Moreover, the court never had to address the question of why New York City should have to pay both plaintiffs' fees for opposing respondents and respondents' fees for opposing plaintiffs.

3. THE LOWER COURT'S STANDARD FOR FEE AWARDS IS NOT WORKABLE AND WILL INEVITABLY GENERATE SATELLITE LITIGATION OVER FEES.

This Court has cautioned that it has set fee standards to avoid a "second major litigation" over fees. *Hensley, supra*, 461 U.S. at 433. *See also City of Burlington v. Dague*, __ U.S. __, 112 S.Ct. 2638, 2643 (1992); *Texas State Teachers Assoc. v. Garland Independent School Dist.*, 489 U.S. 782, 791 (1989). The Second Circuit's standard for awarding fees to intervenors who lack a compensable claim of their own violates this Court's standards because it is exceedingly complex and is likely to generate significant litigation over fees.

(Footnote Continued)
plaintiffs or defendants. Without directly confronting the issue, the District Court Judge termed them defendants during the fairness hearing (W-2663).

The court below held that when a party with "mixed motives" for intervening seeks fees, the District Court must first determine whether the attorney's efforts were "in pursuit of civil rights remedies" or "advanced non-civil rights concerns." The District Court must then determine whether the attorney's time spent advancing non-civil rights concerns "concomitantly advanced" civil rights concerns. Fees may be awarded for any efforts that had the effect of advancing "civil rights concerns" individually or together with non-civil rights concerns (A-21).

This inquiry is similar to the "central issue" test that this Court rejected in *Garland*. Yet unlike the one central issue that had to be divined in *Garland* the Second Circuit has created a multiple central issue test. Under the rule established below, District Courts must decide the motive for each action taken by attorneys for the intervenors and then determine its effect before deciding whether each unit of time is compensable. Inquiries into motives are notoriously difficult and determining whether each hour of attorney time had the effect of advancing civil rights is likely to be equally time consuming. Given the sums of money at stake,[7] litigation over the motive and effect of counsels' actions will be hard fought. As this Court warned in *Garland*, such a test "will spawn a second litigation of significant dimension," 109 S.Ct. at 1493, and has no place in attorneys' fees litigation.

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[7] Plaintiffs' counsel was paid almost two million dollars in settlement of their initial fee application and the District Court ordered intervenors paid over $360,000. Fees payments will likely continue for years to cover enforcement of the consent decree.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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No. 92 -

IN THE

Supreme Court of the United States

ADMINISTRATOR OF THE NEW YORK CITY DEPARTMENT OF HUMAN RESOURCES, *et al.*,

Petitioners,

- against -

ABBOTT HOUSE, *et al.*,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 896 -- August Term 1990

(Petition for rehearing filed October 8, 1991 Granted June 3, 1992 by vacating Opinion filed September 24, 1991, 944 F.2d 1028 (2d Cir. 1991) and replacing it with the following opinion)

Docket No. 90-7698

SHIRLEY WILDER; THOMAS EDWARDS, and SHARON RODWELL; BARRY PARKER; by his mother and next friend, MADELINE BUTLER; ROBIN HERBERT, by her mother and next friend; NANCY HERBERT; SHEDRICK ROBERTS, by his mother and next friend; ANNIE ROBERT; CHRISTOPHER TORIAN, by his mother and next friend; LILLIAN TORIAN, on their own behalf and on behalf of all others similarly situated; DR. KENNETH CLARK, REV. HOWARD MOODY, DR. RICHARD CLOWARD, MILDRED DAVIS,

Plaintiffs,

- against -

BLANCHE BERNSTEIN, individually and as Administrator of the; NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; THE CITY OF

NEW YORK; THE NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES; BARBARA BLUM, individually and as commissioner of the; NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES; BEVERLY SANDERS, individually and as Administrator of; SPECIAL SERVICES FOR CHILDREN; CAROL PARRY; ELIZABETH BEINE; LINDA MARINO, individually and as Director of the Office of Allocations and Accountability of Special services for Children, ARTHUR LEVITT, as comptroller of the State of New York; HARRISON J. GOLDIN; as Comptroller of the City of New York, PAULA RABINOW, individually and as Director of the Joint Planning Service; SANDRA HOWARD, individually and as Supervisor of the Central referral unit; SISTER MARY FRANCENE, individually and as Administrator of the Angel Guardian Home; SISTER SHEILA, individually and as Executive Administrator of Astor Home for children; FRED APERS, individually and as Executive Director of Cardinal Hayes Home for Children; JOHN DEMARTINO, individually and as Executive Director of Cardinal McCloskey school and home for children; JAMES P. O'NEILL, individually and as executive director of catholic guardian society; CATHERINE WHITE, individually and as director of catholic guardian society of the diocese of Brooklyn; SISTER UNA MCCORMACK, individually and as executive director of catholic home bureau for dependent children; DR. JEROME GOLDSMITH, individually and as executive director president of Jewish Board of Guardians; ABE LAVINE, individually and as executive vice president of Jewish Child care; ASSOCIATION OF NY; JACOB TROBE; BROTHER BRENDAN BREEN,

individually and as administrator of Lincoln Hall; BROTHER CHRISTOPHER FOLEY; RALPH CHILLION, individually and as Director of Little Flower Children's services; SISTER ROSALIE MCNAUGHTON, individually and as executive director of McMahon services for children; SISTER MARY JAMES, individually and as administrator of Madonna Heights School for Girls; KENNETH A. MILLER, individually and as director of Maimonides Residential Centers; ISAAC MAIZES; SISTER MARY CHRYSOSTOM, individually and as administrator of Mercy Home for Children; BATHSHEVA MANDEL, individually and as director of Mishkon B'Nai Y'Israel; MONSIGNOR EDMUND F. FOGARTHY, individually and as Executive director of Mission of the Immaculate Virgin; SISTER MARIAN CECILIA SCHNEIDER, individually and as Executive Director of the New York Foundling Hospital; LESTER KAUFMAN, Individually and as Executive Director of Ohel Children's Home; HUGH WALLACE, individually and as Residence Director of Pius XII school; BROTHER ROBERT FONTAINE; DENIE BARRY, individually and as Executive Director of St. Agatha Home for Children; ROSEMARY A. SHERIDAN, individually and as executive director of St. Cabrini Home Inc.; ROBERT J. MCMAHON, individually and as Executive Director of St. Christopher's Home; SISTER MARY PATRICK, individually and as executive director of St. Dominic's Home; SISTER MARY SHEILA, individually and as director of St. Germaine's Home; BROTHER THOMAS TRAGER, individually and as Executive director of St. John's Residence and school for boys; SISTER RITA MEANEY, individually and as

administrator of St. Joseph's Children services; SISTER MARITA PAUL, individually and as executive director of St. Joseph's home of Peekskill; SISTER MARY OLIVA, individually and as administrator of St. Mary's of the angels home; EMANUEL J. STARACE, individually and as executive director of St. Michael's Home; SISTER DELLA MAE QUINN, R.S.M.; REV. ROBERT M. HARRIS, individually and as administrator of St. Vincent's Hall; JOSEPH ALTHEIMER, individually and as administrator of sister of the good shepherd residences,

Defendants-Appellants,

ABBOTT HOUSE, BERKSHIRE FARM CENTER & SERVICES FOR CHILDREN, BROOKLYN HOME FOR CHILDREN, BROOKWOOD CHILD CARE, EPISCOPAL MISSION SOCIETY, GREEN CHIMNEYS CHILDREN'S SERVICE, HEARTSEASE HOME, INC., INWOOD HOUSE, LAKESIDE SCHOOL, LOUISE WISE SERVICES, LUTHERAN COMMUNITY SERVICES, PUERTO RICAN FAMILY ASSOCIATION, ST. CHRISTOPHER-JENNIE CLARKSON CHILD CARE SERVICES, SHELTERING ARMS CHILDRENS SERVICE, SOCIETY FOR SEAMAN'S CHILDREN, SPENCE-CHAPIN SERVICES TO CHILDREN, TALBOT PERKINS CHILDREN'S SERVICES, THE CHILDREN'S AID SOCIETY, and THE CHILDREN'S VILLAGE,

Intervenors-Appellees.

Before: OAKES, *Chief Judge*,
CARDMONE and WALKER, *Circuit Judges*

The City of New York appeals from an order of the United States District Court for the Southern District of New York (Ward, J.) entered June 29, 1990, awarding attorneys' fees to a group of intervenors under 42 U.S.C. § 1988.

Remanded

ELIZABETH DVORKIN, New York, New York (Victor A. Kovner, Corporation Counsel of the City of New York, Stephen J. McGrath, Francis F. Caputo, New York, New York, of counsel), *for Defendants-Appellants.*

DONALD J. COHN, New York, New York; (Bruce Topman, Webster & Sheffield, New York, New York; Stephen Wise Tulin, Polier, Tulin, Clark & Zalk, New York, New York, of counsel), *for Intervenors-Appellees.*

CARDAMONE, *Circuit Judge*:

This panel had before it last year an appeal by the City of New York (City or appellant) from a June 29, 1990 order of the United States District Court for the Southern District of New York (Ward, J.) awarding $355,388.85 in attorneys' fees to appellees-intervenors, a group of 19 private child care agencies.[1] We were asked

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[1] The intervenors group consists of the following agencies: Abbott House, Berkshire Farm Center & Services for Children, Brooklyn Home for Children, Brookwood Child Care, The Children's Aid Society, The Children's Village, Episcopal Mission Society, Green Chimneys Children's Service, Heartsease Home, Inc., Inwood House, Lakeside School, Louise Wise Services, Lutheran Com-

(Footnote Continued)

on that appeal to determine whether the intervenor group, which contributed importantly to the formation of the settlement we had previously approved in *Wilder v. Bernstein*, 848 F.2d 1338 (2d Cir. 1988), was entitled to such an award under 42 U.S.C. § 1988 (1988). In a decision by a divided panel (Oakes, C.J., dissenting), we reversed the intervenors' award. *See Wilder v. Bernstein*, 944 F.2d 1028 (2d Cir. 1991).

Subsequently, a petition for a rehearing with a suggestion for rehearing *en banc* was filled by intervenors. Upon further reflection we are all now convinced, primarily by the views expressed by the Chief Judge in his dissenting opinion, that the intervenors are entitled to an award of attorneys' fees. The petition for rehearing is therefore granted. Our prior opinion reported at 944 F.2d 1028 reversing the district court order of June 29, 1990 is vacated and replaced with the following opinion, which prior to its filing has been circulated to all the active and senior judges of this Court. The case must nonetheless be remanded to the district court for it to sort out what should be the amount of those fees. We set forth guides for that purpose later in this opinion to inform the district court in the exercise of its discretion.

BACKGROUND

The facts are set forth in Judge Ward's thorough opinion reported at 725 F. Supp. 1324 (S.D.N.Y. 1989), with which we assume the reader's familiarity, as well as in his opinion approving the settlement of the underlying

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(Footnote Continued)
munity Services, Puerto Rican Family Association, St. Christopher-Jennie Clarkson Child Care Services, Sheltering Arms Children's Service, Society for Seamen's Children, Spence-Chapin Service to Children, and Talbot Perkins Children's Service.

lawsuit, reported at 645 F. Supp. 1292 (S.D.N.Y. 1986). We recount only those facts relevant to this appeal.

The underlying litigation commenced in 1973 when New York City's child care placement system was challenged by a group of plaintiffs representing a class of Protestant Black children. Plaintiffs ultimately asserted in their complaint four grounds on which they attacked the City's foster care system: (1) the child care system operated to discriminate against children based on race, (2) it discriminated on the basis of religion, (3) it amounted to an establishment of religion, and (4) it unduly burdened the free exercise rights of Protestant children. The complaint sought declaratory and injunctive relief under 42 U.S.C. § 1983, 1985, and 1986, and 28 U.S.C. § 2201 and 2202. The matters alleged in the complaint were claimed to violate the First and Fourteenth Amendments of the United States Constitution, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1982), and New York anti-discrimination regulations, 18 N.Y.C.R.R. § 303.1, 303.2 (1978).

In this complex litigation many groups became involved to varying degrees and for varying reasons. The main participants were (1) plaintiffs, a group of Protestant Black children in need of care outside their homes; (2) defendants New York City and municipal officials responsible for the City's child care system; (3) defendants administrators of private, religiously affiliated, either Jewish or Catholic, child care agencies (defendant agencies); and (4) intervenors administrators of 19 private child care agencies. Among the intervenors were former defendant agencies who had been previously dismissed from the action with prejudice, some who had been dismissed without prejudice, and others who had never before been involved in the action.

In the summer of 1983, shortly before trial was scheduled to begin, plaintiffs and the City began negotiations in an attempt to reach a settlement. At that time intervenors had in their care 4,600 children constituting 25 percent of the 17,000 children then in the City's foster care system. Most of those in intervenors' care were Black Protestant children and belonged therefore to the plaintiff class. In January 1984 some of the eventual intervenors wrote to the Corporation Counsel of New York City expressing strong objections to drafts of the settlement negotiated by it and plaintiffs. In April of that year plaintiffs and the City presented a proposed stipulation of settlement to the district court. The settlement ignored comments and suggestions made by the intervenor agencies, and was objected to by the defendant agencies and by intervenors. Intervenors continued to press their objections and, on June 15, 1984, were granted leave to intervene "for the limited purpose of opposing the proposed settlement."

We digress for a moment to discuss how leave to intervene came about. Although no petition for intervention was filed, letters, memoranda and affidavits objecting to the stipulation were submitted prior to the date intervention was ordered. The customary terms of either "plaintiff-intervenor" or "defendant-intervenor" were not used to refer to the intervenors. Nor does the district court's order set forth on what grounds and under which section of Fed. R.Civ. P. Rule 24 they were permitted entry into the action. In the case of at least some of the former defendant intervening agencies, the original parties had agreed in the decree permitting their dismissal that the dismissed agencies would receive reasonable notice of any proposed settlement and would be permitted, as of right, to appear and participate in any settlement proceeding. The district court considered the

intervenors "nonparties vis-a-vis the underlying constitutional claims in the lawsuit" and, despite their constitutional objections, stated the intervenors joined the lawsuit for the "sole purpose of objecting to the Stipulation on clinical grounds," 645 F. Supp. at 1350.

Nevertheless, it is plain from intervenors' 41 comprehensive objections to the proposed stipulation of settlement that the foster care children's constitutional rights were raised. Some objections were addressed, it is true, solely to the administrative unworkability of the settlement. But a number of objections challenged the stipulation's failure to consider adequately the needs of the children served, and its discrimination on equal protection and religious grounds. For example, intervenors alleged

> 9. ... the Stipulation will reduce the level of care provided to all children and families in the system.
>
> 10. [Twelve paragraphs] taken together authorize provision of their parents' religious beliefs in violation of the First and Fourteenth Amendments to the Constitution of the United States.
>
> ...
>
> 16. The incorporation of . . . the Preferred Placement System... to rank agencies has no place in a federal court order in an action alleging racial and religious discrimination.
>
> 17. No agency should refuse to provide care to any child by reason of such child's race or religion and SSC shall not permit any agency with which it contracts to do so.
>
> ...

19. Paragraph 14 improperly treats transfers to more restrictive placements differently from transfers to less restrictive placements although either may be equally sound for different children.

Some objections were of a mixed variety, raising issues going to the clinical and administrative interests of the agencies as well as to the best interests, constitutional and otherwise, of the children.

Negotiations, in which intervenors then participated, continued through the summer of 1984. In August basic agreement on general topics was reached. The parties continued to negotiate, this time in open court, and in January 1985 a stipulation of settlement was submitted. On October 8, 1986, over the objections of the defendant agencies, the district court approved the stipulation of settlement. On appeal, we affirmed. 848 F.2d 1338.

On March 17, 1989 intervenors moved for attorneys' fees as prevailing parties under § 1988. Specifically, they sought from the City fees of $416,052.50, enhanced by a factor of 1.75 for a total of $775,303.50, disbursements of $17,020.59, and continuing City liability for fees related to enforcement of the decree. The City opposed the application, asserting that intervenors were not a prevailing party because they had no federal constitutional or statutory rights within the meaning of 42 U.S.C. § 1988 (1988) at stake in the litigation. The City had already paid plaintiffs $1,775,000 in attorneys' fees and costs pursuant to an offer of judgment submitted by the City in late June 1989, which was accepted by plaintiffs shortly thereafter.

In its opinion approving the stipulation of settlement and in its opinion awarding attorneys' fees to

intervenors, the district court detailed intervenors' extensive contributions in reaching the settlement finally accepted by all participants, except the defendant agencies. 725 F. Supp. at 1327-29. Because they had "no axes to grind," the district court stated, intervenors were able to measure the proposals according to the best interests of the children and provide it with valuable insights into the clinical and administrative realities of child care. The stipulation of settlement finally adopted, while adhering to the general outline of the original stipulation, was influenced considerably by the concerns aired by intervenors and reflected "'numerous changes -- some minor, some substantial -- that address virtually all of the concerns raised by the intervenors.'" 725 F. Supp. at 1329 (quoting 645 F. Supp. at 1348).

Given their "comprehensive" and "detailed" efforts, their "integral and essential role," and their "significant impact" on the creation of a remedy that vindicated the civil rights of the children and their families in the foster care system, the district court held that the intervenors were therefore prevailing parties entitled to an award of attorneys' fees and costs. It disagreed with intervenors' computation of those fees and denied their request for an enhancement factor. Instead it awarded fees in the amount of $355,388.85 and disbursements of $10,212.35. It is from that decision that the City appealed. We now remand the question of the amount of the award of attorneys' fees to the district court.

DISCUSSION

A. An Intervenor May Be a Prevailing Party

The City challenges the trial court's threshold conclusion that intervenors were a prevailing party and thus eligible for attorneys' fees under 42 U.S.C. § 1988. We begin with the American Rule that declares no attorneys'

fees are recoverable absent express statutory authority for such an award. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 561-62 (1986). Unless Congress empowers it, a federal court has no authority to award attorneys' fees to prevailing parties. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 269 (1975). Hence, our task is to determine whether Congress in enacting § 1988 contemplated an award of attorneys' fees in the present circumstances.

We turn to that statute, which states in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988 (Act). Section 1988 is analyzed in the same manner as other similarly worded fee-shifting statutes. *See Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n.2 (1989) (substantially similar language found in 42 U.S.C. 2000e-5(k), 42 U.S.C. § 2000a-3(b), and 42 U.S.C. § 1988 "is 'a strong indication' that they are to be interpreted alike"). "The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782, 792-93 (1989). Parties have "prevailed" for purposes of shifting attorneys' fees "'if they succeed on any significant issue in litigation which

achieves some of the benefit the parties sought in bringing the action.'" *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)).

Although the statute expressly conditions the award of attorneys' fees upon the discretion of the court, the effect of this language has been interpreted to create a strong preference in favor of the prevailing party's right to fee shifting. Therefore, "[a] party seeking to enforce the rights protected by the statutes covered by [§ 1988], if successful, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" S. Rep. No. 1011, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908, 5912 (Senate Report) (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)). This same section of the legislative history of § 1988 specifically contemplates that an intervenor may be a prevailing party. "In the large majority of cases the party or parties seeking to enforce such rights will be the plaintiffs and/or plaintiff-intervenors. However, in the procedural posture of some cases, the parties seeking to enforce such rights may be the defendants and/or defendant-intervenors." *Id.* at 4 n.4, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 5912 n.4.

The fact that a claim has been resolved by settlement, as in this case, does not preclude a finding that intervenors are prevailing parties; it is plain that a party may prevail when it vindicates rights -- regardless of whether there is a formal judgment -- through a settlement or consent judgment. *See, e.g., Hewitt v. Helms*, 482 U.S. 755, 760-61 (1987); *Maher v. Gagne*, 448 U.S. 122, 129 (1980); *Koster v. Perales*, 903 F.2d 131, 134 (2d Cir. 1990); Senate Report at 5, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 5912.

Actions alleging civil rights violations traditionally seek injunctive relief directly affecting not only the plaintiffs, but also certain non-participants and less directly the public at large. In addition to permitting non-participants to protect their implicated interests, intervention furthers the goals of efficiency and uniformity. To forbid the shifting of attorneys' fees to intervenors, who could otherwise bring a separate action later as plaintiffs alleging the same civil rights violations -- even, as in this case, those that persist after entry of a proposed consent settlement -- defeats the goal of judicial economy. Hence, there is no reason why the present intervenors, whether they be styled intervenor-plaintiffs or intervenor-defendants, may not be prevailing parties for purposes of § 1988.

B. Present Intervenors are Prevailing Parties

The next question to be addressed is whether the present agency intervenors are such prevailing parties. In awarding attorneys' fees, the district court found that as a result of intervenors' efforts the settlement was modified in ways that directly benefitted the children in the child care system, and it concluded that a material alteration of the legal relationship of the parties in a manner that Congress sought to promote in § 1988 had therefore been effected. 725 F. Supp. at 1332.

Appellant City does not dispute the fact that appellees' input was helpful to children in the child care system, but it contends that contributions to a settlement, no matter how important or helpful, do not entitle these intervenors to attorneys' fees. Something more is needed, the City insists, before an award may be made under § 1988, that is, the party seeking an award must assert a violation of its *own* rights under the applicable

civil rights statutes. Because intervenors asserted no such right, the City concludes, they may not be considered prevailing parties. Careful analysis of the statute's language, rules, legislative history and decisional law construing § 1988 does not support the City's view of the statute.

We begin by reviewing the language of that statute, *United States v. James*, 478 U.S. 597, 604 (1986), and assume the ordinary meaning of the language used expresses Congress' purpose. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). Section 1988 expressly permits fees to be shifted to parties who prevail in certain enumerated civil rights actions. A limitation that only parties who prevail in vindicating their own civil rights may be awarded attorneys' fees is not found in the Act and such a reading of § 1988 does not comport with its plain and ordinary meaning.

At the same time we recognize that there are limitations on who may intervene in a civil rights suit. Either the applicant must have an interest implicated by the underlying suit that might be impaired, one which is not adequately represented by the original parties to the action, Fed. R. Civ. P. Rule 24(a)(2), or its "claim or defense and the main action [must] have a question of law or fact in common." Fed. R. Civ. P. Rule 24(b)(2). Rule 24 does not permit just any interested person to intervene and become a party to a suit. Since § 1988 extends fees only to prevailing *parties* in the action or proceeding, *see Morales v. Turman*, 820 F.2d 728, 732 (5th Cir. 1987) (*amicus curiae*, without intervention or standing, never participated as "party" in proceeding and is not entitled to fees despite providing beneficial input to remedy), ruling that present intervenors are prevailing parties will not open the flood-gates to *amicus curiae*, good samaritans, or even litigious meddlers so that they

may "team up" and overburden the nonprevailing party with excessive attorneys' fees. Rule 24 permits intervention in a civil rights action therefore not only to parties alleging violations of their own civil rights, but also to intervening parties alleging violations of the civil rights of individuals to whom they owe some duty or have a legal obligation to protect.

Considering next the legislative history, it may arguably be asserted from certain references that fee shifting is intended for the victims who vindicate their own civil rights. *See, e.g.*, Senate Report at 2, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 5910 ("If private citizens are to be able to assert *their* civil rights . . . then citizens must have the opportunity to recover what it costs *them* to vindicate these rights in court") (emphasis added); H.R. Rep. No. 1588, 94th Cong., 2d Sess. 1 (1976) (act designed to grant effective access to courts for the majority of *victims* of civil rights violations who are unable financially to vindicate *their* rights).

Yet, it would be relying on a very slim reed indeed were we to limit the plain text of a statute because of two references found in its legislative history. Neither reference purports to limit the scope of the Act's effect, and each uses only general wording that applies to fee-shifting in the typical case. The omission of a reference in that history to the rights of third parties, those permitted to assert the rights of others through the law of *jus tertii*, or associational standing, is not dispositive; and, to place significance on it reads the cited legislative reports out of context. The legislative history does not express an intent so clearly contrary to the statute that it can support a conclusion more limited than the ordinary meaning of the statutory language used, one, moreover, in conflict with the broad remedial purpose of § 1988. *See Con-*

sumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

Instead, Congress aimed under the Act "to use the broadest and most effective remedies" to ensure that the objectives of the civil rights laws are attained. *See* Senate Report at 3, *reprinted in* U.S. Code Cong. & Admin. News at 5910. One way to accomplish that purpose is to promote the private enforcement of civil rights by encouraging litigants to act as "private attorneys general." The legislature recognized that inadequate resources of the enforcement division of the executive branch prevented it from eradicating all civil rights abuses solely through the government's efforts. Shifting attorneys' fees enabled Congress to promote vigorous enforcement of its civil rights policies, while limiting the growth of the bureaucracy charged with its administration. Again, Congress was aware that victims of civil rights violations usually are not wealthy people and "*[t]he organizations who have helped them* bring their cases are frequently not well financed." *Donnell v. United States*, 682 F.2d 240, 246 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1204 (1983) (quoting 122 Cong. Rec. 35127 (October 1, 1976) (remarks of Rep. Holtzman)) (emphasis added). In fact, the Senate Report in its entirety stands as a singularly lucid pronouncement that the award of attorneys' fees made under § 1988 should be interpreted broadly so as to avoid frustrating enforcement of fundamental laws.

Thus, intervenors may act effectively as private attorneys general in vindicating abuses of civil rights, and where they have "contributed importantly to the creation of remedies," we and other courts have held they are entitled to an award of attorneys' fees. *See United States v. Board of Educ. of Waterbury*, 605 F.2d 573, 576 (2d Cir. 1979). *See also Grove v. Mead School Dist. No. 354*, 753 F.2d 1528, 1535 (9th Cir.), *cert. denied*, 474 U.S. 826

(1985) ("[a]wards to intervenors should not be granted unless the intervenor plays a significant role in the litigation"); *Miller v. Statts*, 706 F.2d 336, 340-42 (D.C. Cir. 1983) (intervenors who allege a colorable civil rights claim may be entitled to attorneys' fees); *Donnell*, 682 F.2d at 247 (fees may be awarded to intervenors in a successful suit if they played a significant role in producing the outcome).

Waterbury presents analogous facts instructive on the resolution of the present case. There the intervenor was not the school children whose civil rights were implicated in the underlying school desegregation case, but was an organization consisting of Hispanic community leaders, individuals, and parents of some of the students. *Waterbury*, 605 F.2d at 574. In the foster care context presented here, the intervenor child care agencies have similar *in loco parentis* duties running to the children in their care, *see* New York Soc. Serv. Law § 383-384 (McKinney 1983 & Supp. 1991); *cf.* 42 U.S.C. § 675(5)(A) (1988). In both cases, the intervenor group's constituency included the plaintiff class of children asserting a civil rights interest.

For many would be intervenors, the availability of such a remedy would be a hollow one were the recovery of attorneys' fees not to exist as an incentive. *See* Senate Report at 3, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 5910; Tamanaha, *The Cost of Preserving Rights: Attorneys' Fee Awards and Intervenors in Civil Rights Litigation*, 19 Harv. C.R.-C.L. L. Rev. 109, 118-20 (1984). Although capable of acting as effective private attorneys general, many potential parties would never intervene in civil rights actions because they, and the constituencies the represent, are economically disadvantaged. *See* Tamanaha, *supra*, at 143-44 n.130. In addition to duplicating effectively the limitations on joining actions

imposed by Rule 24, a narrow interpretation of § 1988 thwarts the fashioning of appropriate injunctive relief. Without the valuable perspective of those who might properly intervene -- but for their financial inability -- a reconciliation of the diverse community interests of those affected is frustrated. *See Waterbury*, 605 F.2d at 576.

Consequently, because implicated interests or common legal or factual questions involved violations of civil rights protected by the Constitution or federal statutes enumerated under § 1988, and because the efforts of the intervenors contributed importantly to the creation of remedies Congress sought to advance in the fee statute, the present intervenors properly were held to be prevailing parties entitled to an award of attorneys' fees.

C. Computation of Intervenors' Attorneys' Fees Award

How to disentangle the numerous objections to the settlement and decide which are subject to an award and which are not is the remaining question. Rule 24, as earlier noted, requires that a minimum nexus or connection be present between the intervening party whose interests are implicated and the original parties to the action. Given that the relationship between the intervenors in this case and the children entrusted in their care provided a sufficient nexus, our inquiry turns to whether intervenors' efforts effected the requisite "material alteration" as envisioned by Congress in § 1988, *see Texas State Teachers Ass'n*, 489 U.S. at 793, that is, whether intervenors' "participation contributed importantly to the creation of remedies." *Waterbury*, 605 F.2d at 576.

In answering that inquiry the following discussion should be helpful. First, efforts by counsel for intervenors that merely duplicate those of the plaintiffs in

effectuating the foster care children's civil rights should not result in an award of attorneys' fees. *See Grove*, 753 F.2d at 1535; *Donnell*, 682 F.2d at 247-48 (where "the intervenor contributed little or nothing of substance in producing the outcome, then fees should not be awarded"). *See also Alabama Power Co. v. Gorsuch*, 672 F.2d 1 (D.C. Cir. 1982); *Seattle Sch. Dist. No. 1 v. Washington*, 633 F.2d 1338 (9th Cir. 1980), *aff'd*, 458 U.S. 457 (1982). The plaintiffs in a civil rights action have the priority claim for an award of fees as prevailing parties where their efforts have effectuated some or all of the civil rights involved in the litigation. The policies underlying private attorneys general and intervention are not so compelling when a suit has already been initiated and the potential intervenor's interests are adequately represented. Otherwise there would be a temptation to load up unnecessarily on intervenors in civil rights actions to compel defendants to settle because of the potential exposure to large legal fees.

The legal efforts of a plaintiff, on the other hand, may be legally deficient in a particular case or, at least, on some issues in the case. Hence, second, when non-duplicative efforts by intervenors effectuate the civil rights at issue they are entitled to an award because such a result furthers the purpose of the civil rights statutes in a fashion envisioned by Congress. For instance, where intervenors prevail in demonstrating that constitutional infirmities persisted under a proposed stipulation agreed to by plaintiffs, as occurred in the present case, their efforts probably would not be considered duplicative. Whether there was duplication of effort, nevertheless, is a question to be resolved by the district court.

Third, it follows that parties whose intervention produces results that are unrelated to remedying violations of civil rights are not eligible for attorneys' fees.

Section 1988 is expressly limited to suits to enforce specified civil rights provisions. Section 1988 therefore would not apply to an intervenor who prevails upon a non-civil rights claim because no "material alteration of the legal relationship ... *in a manner which Congress sought to promote*" has been achieved. *Texas State Teachers Ass'n*, 489 U.S. at 793 (emphasis added).

We recognize there will be situations where efforts expended on separate issues likely will be difficult to sort out. Questions of duplication and mixed motives are further clouded when litigation is resolved through settlement, when intervening parties object to a proposed settlement agreed to by the original plaintiffs, and still further in a case such as the instant one where all the parties claim to be acting in the foster children's best interests. Courts nevertheless must take care not to shift attorneys' fees in a manner Congress did not envision. In *Waterbury*, we noted that complex civil rights cases require a court to be flexible when using its discretion in awarding attorneys' fees to ensure that Congress' aim in enacting these statutes is realized. *Waterbury*, 605 F.2d at 576.

As a consequence, we hold finally that where a party has mixed motives for intervening, each of which are permissible grounds for intervening, and the intervening party prevails, the non-duplicative attorneys' fees attributable to the efforts expended in pursuit of civil rights remedies may be recovered. And, where the efforts that furthered civil rights objectives concomitantly advanced non-civil rights concerns, for example, administrative and clinical concerns, attorneys' fees may also be awarded. Any adjustment in the fee award based upon the extent to which a party's participation contributed to the ultimate remedy, including considerations of

duplication and motivations other than civil rights, rests appropriately in the district court's sound discretion.

CONCLUSION

The district court awarded attorneys' fees to intervenors because the 19 nondefendant child care agencies prevailed on civil rights claims as well as clinical and administrative objections to the proposed stipulation. It did not discuss to what degree the work of intervenors' counsel may have been duplicative with that expended by plaintiffs' counsel, or what portion of that work can be attributed solely to advancing concerns other than civil rights violations. For these determinations, and any corresponding changes in the fee award they might merit, we remand the instant matter to the district court for further proceedings in accordance with this opinion.

Decision and Judgment of the United States Court of Appeals for the Second Circuit, Dated September 4, 1991

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 896 -- August Term 1990

(Argued January 17, 1991 Decided September 24, 1991)

Docket No. 90-7698

SHIRLEY WILDER; THOMAS EDWARDS, and SHARON RODWELL; BARRY PARKER; by his mother and next friend, MADELINE BUTLER; ROBIN HERBERT, by her mother and next friend; NANCY HERBERT; SHEDRICK ROBERTS, by his mother and next friend; ANNIE ROBERT; CHRISTOPHER TORIAN, by his mother and next friend; LILLIAN TORIAN, on their own behalf and on behalf of all others similarly situated; DR. KENNETH CLARK, REV. HOWARD MOODY, DR. RICHARD CLOWARD, MILDRED DAVIS,

Plaintiffs,

- v. -

BLANCHE BERNSTEIN, individually and as Administrator of the; NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; THE CITY OF NEW YORK; THE NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES; BARBARA BLUM, individually and as commissioner of the; NEW YORK STATE DEPARTMENT OF

SOCIAL SERVICES; BEVERLY SANDERS, individually and as Administrator of; SPECIAL SERVICES FOR CHILDREN; CAROL PARRY; ELIZABETH BEINE; LINDA MARINO, individually and as Director of the Office of Allocations and Accountability of Special services for Children, ARTHUR LEVITT, as comptroller of the State of New York; HARRISON J. GOLDIN; as Comptroller of the City of New York, PAULA RABINOW, individually and as Director of the Joint Planning Service; SANDRA HOWARD, individually and as Supervisor of the Central referral unit; SISTER MARY FRANCENE, individually and as Administrator of the Angel Guardian Home; SISTER SHEILA, individually and as Executive Administrator of Astor Home for children; FRED APERS, individually and as Executive Director of Cardinal Hayes Home for Children; JOHN DEMARTINO, individually and as Executive Director of Cardinal McCloskey school and home for children; JAMES P. O'NEILL, individually and as executive director of catholic guardian society; CATHERINE WHITE, individually and as director of catholic guardian society of the diocese of Brooklyn; SISTER UNA MCCORMACK, individually and as executive director of catholic home bureau for dependent children; DR. JEROME GOLDSMITH, individually and as executive director president of Jewish Board of Guardians; ABE LAVINE, individually and as executive vice president of Jewish Child care; ASSOCIATION OF NY; JACOB TROBE; BROTHER BRENDAN BREEN, individually and as administrator of Lincoln Hall; BROTHER CHRISTOPHER FOLEY; RALPH CHILLION, individually and as Director of Little Flower Children's services; SISTER ROSALIE

MCNAUGHTON, individually and as executive director of McMahon services for children; SISTER MARY JAMES, individually and as administrator of Madonna Heights School for Girls; KENNETH A. MILLER, individually and as director of Maimonides Residential Centers; ISAAC MAIZES; SISTER MARY CHRYSOSTOM, individually and as administrator of Mercy Home for Children; BATHSHEVA MANDEL, individually and as director of Mishkon B'Nai Y'Israel; MONSIGNOR EDMUND F. FOGARTHY, individually and as Executive director of Mission of the Immaculate Virgin; SISTER MARIAN CECILIA SCHNEIDER, individually and as Executive Director of the New York Foundling Hospital; LESTER KAUFMAN, Individually and as Executive Director of Ohel Children's Home; HUGH WALLACE, individually and as Residence Director of Pius XII school; BROTHER ROBERT FONTAINE; DENIE BARRY, individually and as Executive Director of St. Agatha Home for Children; ROSEMARY A. SHERIDAN, individually and as executive director of St. Cabrini Home Inc.; ROBERT J. MCMAHON, individually and as Executive Director of St. Christopher's Home; SISTER MARY PATRICK, individually and as executive director of St. Dominic's Home; SISTER MARY SHEILA, individually and as director of St. Germaine's Home; BROTHER THOMAS TRAGER, individually and as Executive director of St. John's Residence and school for boys; SISTER RITA MEANEY, individually and as administrator of St. Joseph's Children services; SISTER MARITA PAUL, individually and as executive director of St. Joseph's home of Peekskill; SISTER MARY OLIVA, individually and as administrator of St. Mary's

of the angels home; EMANUEL J. STARACE, individually and as executive director of St. Michael's Home; SISTER DELLA MAE QUINN, R.S.M.; REV. ROBERT M. HARRIS, individually and as administrator of St. Vincent's Hall; JOSEPH ALTHEIMER, individually and as administrator of sister of the good shepherd residences,

Defendants-Appellants,

ABBOTT HOUSE, BERKSHIRE FARM CENTER & SERVICES FOR CHILDREN, BROOKLYN HOME FOR CHILDREN, BROOKWOOD CHILD CARE, EPISCOPAL MISSION SOCIETY, GREEN CHIMNEYS CHILDREN'S SERVICE, HEARTSEASE HOME, INC., INWOOD HOUSE, LAKESIDE SCHOOL, LOUISE WISE SERVICES, LUTHERAN COMMUNITY SERVICES, PUERTO RICAN FAMILY ASSOCIATION, ST. CHRISTOPHER-JENNIE CLARKSON CHILD CARE SERVICES, SHELTERING ARMS CHILDRENS SERVICE, SOCIETY FOR SEAMAN'S CHILDREN, SPENCE-CHAPIN SERVICES TO CHILDREN, TALBOT PERKINS CHILDREN'S SERVICES, THE CHILDREN'S AID SOCIETY, and THE CHILDREN'S VILLAGE,

Intervenors-Appellees.

Before: OAKES, *Chief Judge*,
CARDAMONE and WALKER, *Circuit Judges*

The City of New York appeals from an order of the United States District Court for the Southern District of New York (Ward, J.) entered June 29, 1990, awarding

attorneys' fees to a group of intervenors under 42 U.S.C. § 1988.

Reversed.

Judge Oakes dissents in a separate opinion.

ELIZABETH DVORKIN, New York, New York (Victor A. Kovner,

Corporation Counsel of the City of New York, Stephen J. McGrath, Francis F. Caputo, New York, New York, of counsel), *for Defendants-Appellants*.

DONALD J. COHN, New York, New York; (Bruce Topman, Webster & Sheffield, New York, New York; Stephen Wise Tulin, Polier, Tulin, Clark & Zalk, New York, New York, of counsel), *for Intervenors-Appellees*.

CARDAMONE, *Circuit Judge*:

We again visit the controversy regarding New York City's scheme for providing child care services to foster children who require placement in institutions and foster homes. Before us is an appeal by the City of New York (City or appellant) from a June 29, 1990 order of the United States District Court for the Southern District of New York (Ward, J.). awarding $355,388.85 in attorney's fees to appellees-intervenors, a group of 19 private child care agencies.[1]

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[1] The intervenors group consists of the following agencies: Abbott House, Berkshire Farm Center & Services for Children, Brooklyn Home for Children, Brookwood Child Care, The Children's Aid Society, The Children's Village, Episcopal Mission Society, Green Chimneys Children's Service, Heartsease Home, Inc., Inwood House, Lakeside School, Louise Wise Services, Lutheran Community Services, Puerto Rican Family Association, St. Christopher-Jennie Clarkson Child Care Services, Sheltering Arms Children's Service, Society for Seamen's Children, Spence-Chapin Service to Children, and Talbot Perkins Children's Services.

We are asked to determine whether an intervenor group, which contributed importantly to the formation of the settlement we approved in *Wilder v. Bernstein*, 848 F.2d 1338 (2d Cir. 1988), is entitled to an award of attorney's fees under 42 U.S.C. § 1988 (1988). In making that determination we can see Congress planned that individuals asserting their civil rights should be able to recover what it cost them to vindicate these rights, and that awarding attorney's fees to such individuals implemented this design. Where Congress looks to one thing as a solution to a problem, courts should not look to another thing, and thereby alter Congress' plan by broadening the definition of those entitled to such fees. Because we think that is what the district court did in this case, we reverse.

BACKGROUND

The facts are set forth in Judge Ward's thorough opinion reported at 725 F. Supp. 1324 (S.D.N.Y 1989), with which we assume the reader's familiarity, as well as in his opinion approving the settlement of the underlying lawsuit, reported at 645 F. Supp. 1292 (S.D.N.Y. 1986). We recount only those facts relevant to this appeal.

The underlying litigation commenced in 1973 when New York City's child care placement system was challenged by a group of plaintiffs representing a class of Protestant Black children. Plaintiffs ultimately asserted in their complaint four grounds on which they attacked the City's foster care system: (1) the child care system operated to discriminate against children based on race, (2) it discriminated on the basis of religion, (3) it amounted to an establishment of religion, and (4) it unduly burdened the free exercise rights of Protestant children, who were not Catholic or Jewish. The complaint sought declaratory and injunctive relief under 42

U.S.C. § 1983, 1985, and 1986, and 28 U.S.C. § 2201 and 2202. The matters alleged in the complaint were claimed to violate the First and Fourteenth Amendments, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 200d (1982), and New York anti-discrimination regulations, 18 N.Y.C.R.R. §§ 303.1, 303.2 (1978).

In this complex litigation many groups became involved to varying degrees and for varying reasons. The main participants were (1) plaintiffs, a group of Protestant Black children, who were neither Catholic nor Jewish, in need of care outside their homes; (2) defendants New York City and municipal officials responsible for the City's child care system; (3) defendants administrators of private, religiously affiliated, either Jewish or Catholic, child care agencies (defendant agencies); and (4) intervenors.

In the summer of 1983, shortly before trial was scheduled to begin, plaintiffs and the City began negotiations in an attempt to reach a settlement. At that time intervenors had in their care 4,600 children constituting 25 percent of the 17,000 children then in the City's foster care system. Most of those in intervenors' care were Black Protestant children and belonged therefore to the plaintiff class. In January 1984 some of the eventual intervenors wrote to the Corporation Counsel of New York City expressing strong objections to drafts of the settlement negotiated by it and plaintiffs. In April of that year plaintiffs and the City presented a proposed stipulation of settlement to the district court. The settlement ignored comments and suggestions made by the intervenor agencies, and was objected to by the defendant agencies and by intervenors. Intervenors continued to press their objections and, on June 15, 1984, were granted leave to intervene "for the limited purpose of opposing the proposed settlement."

Appellees presented comprehensive criticisms of the proposed settlement supported by affidavits from child care professionals. The objections were addressed to the administrative unworkability of the settlement, its failure to consider adequately the needs of the children served, and its discrimination on religious grounds. Negotiations, in which intervenors then participated, continued through the summer. In August basic agreement on general topics was reached. The parties continued to negotiate, this time in open court, and in January 1985 a stipulation of settlement was submitted. On October 8, 1986, over the objections of the defendant agencies, the district court approved the stipulation of settlement. On appeal, we affirmed the settlement. 848 F.2d 1338.

On March 17, 1989 intervenors moved for attorney's fees under § 1988. Specifically, they sought from the City fees of $416,052.50, enhanced by a factor of 1.75 for a total of $775,303.50, disbursements of $17,020.59, and continuing City liability for fees related to enforcement of the decree. The City opposed the application, asserting that intervenors were not a prevailing party because they had no federal constitutional or statutory rights within the meaning of 42 U.S.C. § 1988 (1988) at stake in the litigation. The City had already paid plaintiffs $1,775,000 in attorney's fees and costs pursuant to an offer of judgment submitted by the City in late June 1989, which was accepted by plaintiffs shortly thereafter.

In its opinion approving the stipulation of settlement and in its opinion awarding attorney's fees to intervenors, the district court detailed intervenors' extensive contributions in reaching the settlement finally accepted by all participants, except the defendant agencies. Because they had "no axes to grind," the district

court stated, intervenors were able to measure the proposals according to the best interests of the children and provide it with valuable insights into the clinical and administrative realities of child care. The stipulation of settlement finally adopted, while adhering to the general outline of the original stipulation, was influenced by the concerns aired by intervenors.

The court found intervenors' efforts were essential to the creation of a workable remedy that vindicated the civil rights of the children and their families in the foster care system, and held that the intervenors were therefore prevailing parties entitled to an award of attorney's fees and costs. It did not accept appellees' computation of fees, denied their request for an enhancement factor, and awarded fees in the amount of $355,388.85 and disbursements of $10,212.35. The City of New York has appealed.

DISCUSSION

The City challenges the district court's conclusion that intervenors were a prevailing party and thus eligible for attorney's fees under 42 U.S.C. § 1988 (1988). We begin with the American Rule that declares no attorney's fees are recoverable absent express statutory authority for an award. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 561-62 (1986). Unless Congress empowers it, a federal court has no authority to award attorney's fees to prevailing parties. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 269 (1975). Hence, our task is to determine whether Congress in enacting § 1988 contemplated an award of attorney's fees in the present circumstances.

We turn to that statute, which states in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988 (1988). Section 1988 is analyzed in the same manner as other similarly worded fee-shifting statutes. *See Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n.2 (1989). "The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782, 792-093 (1989).

There is no question that the legislative history of § 1988 contemplates that an intervenor may be a prevailing party. S. Rep. No. 1011, 94th Cong., 2d Sess. 4 n.4, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908, 5912 n.4 (Senate Report) ("In the large majority of cases the party or parties seeking to enforce such rights will be the plaintiffs and/or plaintiff-intervenors."). Nor does the fact that a claim has been resolved by settlement, as in this case, preclude an award of attorney's fees to the prevailing party; it is plain that a party may prevail when it vindicates rights -- regardless of whether there is a formal judgment -- through a settlement or consent judgment. *See Hewitt v. Helms*, 482 U.S. 755, 760-61 (1987); *Maher v. Gagne*, 448 U.S. 122, 129 (1980); *Koster v. Perales*, 903 F.2d 131, 134 (2d Cir. 1990); Senate Report at 5, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 5912. In awarding attorney's fees in the instant case,

the district court found that as a result of intervenors' efforts the settlement was modified in ways that directly benefitted the children in the child care system, and it concluded that a material alteration of the legal relationship of the parties in a manner that Congress sought to promote in § 1988 had therefore been effected. 725 F. Supp. at 1332.

Appellant City does not dispute the fact that appellees' input was helpful to children in the child care system, but it contends that contributions to a settlement, no matter how important or helpful, do not entitle these intervenors to attorney's fees. Something more is needed before a court may take an award under § 1988, that is, the party seeking an award must assert a violation of its *own* rights under the applicable civil rights statutes. The City insists intervenors have asserted no such right and therefore may not be considered prevailing parties. We agree.

In *United States v. Bd. of Educ. of Waterbury*, 605 F.2d 573 (2d Cir. 1979), we held intervenors may be awarded attorney's fees if they "contributed importantly to the creation of remedies." *Id.* at 576; *see also Grove v. Mead School Dist. No. 354*, 753 F.2d 1528, 1535 (9th Cir. 1985) ("[a]wards to intervenors should not be granted unless the intervenor plays a significant role in the litigation"); *cf. Donnell v. United States*, 682 F.2d 240, 247 (D.C. Cir. 1982) (fees should not be awarded to intervenors in a successful suit if they played an insignificant role in producing the outcome).

Yet, in *Waterbury*, we did not specifically address the question of whether an intervenor, in order to be entitled to attorney's fees as a prevailing party, must also assert an interest protected by the civil rights statutes. An examination of the factual background in *Waterbury*

reveals that many members of the intervenor group's constituency in that case asserted such a civil rights interest. *See* 605 F.2d at 574 (an organization consisting of Puerto Rican parents, community leaders, and individuals, was permitted to intervene in an action seeking to desegregate schools in order to protect the right of Waterbury's Hispanic students to attend integrated schools and to be free from disproportionately bearing the burden of the desegregation); *see also Donnell*, 682 F.2d at 244 (seven black voters intervening on the side of the United States in an action brought by the Board of Supervisors of Warren County, Mississippi, seeking a declaratory judgment that a plan to establish voting districts did not have a racially discriminatory purpose or effect were found to be prevailing parties.) Thus, *Waterbury* does not bear the weight placed on it by the district court because the intervenors there were seeking to vindicate their own civil rights, not the rights of others.

Legislative history supports the view that though intervenors may be prevailing parties, it is only when they assert their own civil rights that they are so considered. Congress planned on having § 1988 serve as a mechanism for vindicating the rights of those whose civil rights had been violated, not for forwarding civil rights in general. For example, the House Report states:

> Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, [§ 1988] is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law.

H.R. Rep. No. 1588, 94th Cong., 2d Sess. 1 (1976). The Senate Report contains language that even more strongly suggests that attorney's fees were to be those paid to the *victims* of constitutional injury, not simply a party that aids in upholding the rights of those victims. Senate Report at 2, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 5910 ("If private citizens are to be able to assert *their* civil rights . . . then citizens must have the opportunity to recover what it costs *them* to vindicate these rights in court") (emphasis added).

Because § 1988 is an exception carved out of the American Rule by Congress, we must take care not to award attorney's fees that the legislative branch has not authorized. The choice as to whether fees are available and under what circumstances is a function that Congress has reserved to itself. *Russo v. New York*, 672 F.2d 1014, 1023 (2d Cir. 1982), *modified on other grounds*, 721 F.2d 410. Before awarding fees it is necessary for a court to find therefore some specific congressional plan that provides that an intervenor, not asserting its own civil rights, was an intended beneficiary of § 1988. Neither the House nor the Senate Reports just cited contain any notion that Congress anticipated that such parties would be the beneficiaries of this legislation. Thus, it seems inescapable that Congress did not contemplate awards of attorney's fees under § 1988 to persons other than to those whose civil rights have been violated.

Here no member of the intervenor group has asserted any civil rights interests of its own. Instead, intervenors became involved initially in the instant litigation because of their fear both that administrative burdens imposed by the original proposed settlement would make the foster care system even more unworkable than the record shows it presently is, and also give rise to those clinical concerns that the list of intervenors'

objections in the trial court reveals, *see* 645 F. Supp. at 1346-47. On that score alone intervenors would doubtless have entered the settlement negotiations regardless of whether attorney's fees were available. Further, intervenors cannot be said to be the legal custodians or guardians of the children in their care. That responsibility belongs to the appropriate City agency. *See* N.Y. Soc. Serv. Law § 383(2) (McKinney 1983 & Supp. 1991). Thus, it does not appear that intervenors are possessed of any interest that permits them to assert the civil rights of the foster children in their care and to be considered a prevailing party under § 1988.

Finally, we agree with the district court that appellees' efforts were beneficial to the children whose rights were at stake, but the City's earlier nearly two million dollar payment for plaintiffs' attorney's fees was for services that also vindicated the constitutional rights of Protestant Black children, the same constituency intervenors seek to be rewarded for representing. Congress and not the courts determines whether a party may be awarded attorney's fees. *See Alyeska Pipeline Serv. Co.*, 421 U.S. at 269. And, since the intervenors before us are not one of those parties, the district court's award of attorney's fees to them must be reversed.

CONCLUSION

The judgment of the district court is reversed. Intervenors' request for attorney's fees on appeal is denied. Each party shall bear its own costs.

OAKES, *Chief Judge*, dissenting:

I dissent essentially for the reasons stated by Judge Ward, *Wilder v. Bernstein*, 725 F. Supp. 1324 (S.D.N.Y. 1989), and because I think that the distinction drawn by the panel majority between this case and *United States v. Board of Education of Waterbury, Connecticut*, 605 F.2d

573 (2d Cir. 1979), where we awarded intervenors their attorneys' fees, is a distinction without a difference. The panel majority's narrow and formalistic reading of the term "prevailing party" takes us down the same road as *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) -- road rejected by Congress' enactment of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1988).

In contrast to the panel majority, I find no basis for the argument that Congress intended to limit attorney's fees to those intervenors who sought to vindicate their "own" civil rights claims. And even if the legislative history were to reveal reeds from which a court might weave such an interpretation, the final production would run contrary to the underlying purpose of section 1988. Complex litigation, such as the case at hand, requires that the allocation of attorneys' fees be approached with flexibility, if we are to adhere to Congress' goal of providing incentives to those who act as private attorneys general to aid in the eradication of civil rights violations. *See* S. Rep. No. 1011, 94th Cong., 2d Sess. 2-3, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908, 5909-5911; *Waterbury*, 605 F.2d at 576. To shift the focus of section 1988, as the panel majority does, from crafting an equitable remedy to the delineation of which rights belong to whom, distracts us from the goal Congress has set before us. As we said in *Waterbury*, "The precise remedy does not follow logically from the determination of liability, but rather reflects a careful reconciliation of the interests of the many affected members of the community and a choice among a wide range of possibilities." 605 F.2d at 576. Thus, unlike the panel majority, I cannot simply allude to Judge Ward's opinion and assume familiarity with it because doing so tends to underemphasize the essential findings in the case. Rather, I think

it important to state precisely who the intervenors are, what they did, and why Judge Ward concluded that he was bound to award them attorneys' fees by our *Waterbury* decision.

This complaint challenged the entire city's child care system on the basis that it: (1) operated to discriminate against children based on race and religion; (2) amounted to the establishment of religion; and, (3) unduly burdened the free exercise rights of Protestant children, as well as (4) denied black Protestant children equal access to child care services. *Wilder*, 725 F. Supp. at 1327. The intervenors are a group of nineteen private child care agencies which were properly permitted to intervene in this action; they represent a broad spectrum of foster care clinicians and administrators who together care for approximately 4600 children. *Id.* at 1327 & n.3 In the sixteen years of litigation involved in this case up to Judge Ward's decision in the district court, the intervenors did the following:

1. They strongly objected to the draft Stipulation of Settlement on the part of the plaintiff class and the city defendants on the basis not just that the proposed settlement was administratively unworkable but that it failed to protect the best interests of the children and unconstitutionally discriminated against children whose parents exercised a religious preference in child care. *Id.* at 1328.

2. The objections the intervenors presented were "comprehensive" and supported by detailed affidavits providing "important background and insight." *Id.*

3. The intervenors "played an integral role" concerning the content of the proposed Stipulation, and "sparked primarily" by their criticisms and suggestions,

the parties resolved the numerous legal and child care issues involved. *Id.*

4. The final version of the Stipulation of Settlement, as supported by the intervenors, was ultimately approved by the court in *Wilder v. Bernstein*, 645 F. Supp. 1292 (S.D.N.Y. 1986), *aff'd*, 848 F.2d 1338 (2d Cir. 1988). In the district court's decision approving the settlement, the court noted that the intervenor's "direct participation in the New York City foster care system, and their ongoing contact with the children in care, give them the ability and incentive to comment authoritatively on the likely impact of the settlement on agency administrators and clinicians and on the children they serve." *Wilder*, 645 F. Supp. at 1350. In Judge Ward's later decision awarding the intervenor's attorneys' fees, presently on appeal, he said that "[t]he intervenors worked to promote a more viable solution to the problems presented by the foster care system in New York, while at the same time assuring that the best interests of all children in the system were taken into account .... they played an essential role in forging the final version of the Stipulation which was acceptable to all the parties except the sectarian agencies ...." *Wilder*, 725 F. Supp. at 1329.

The above being true, it seems to me that this case fits squarely within our *Waterbury* case where we said that "[a]n intervenor is certainly a *party*," 605 F.2d at 576,[1] and that even though a consent decree was involved the intervenors could be considered a prevailing party because they succeeded in opposing a plan "which unfairly

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[1] This point has been referred to favorably by other courts. *E.g., Seattle School Dist. No. 1 v. State of Washington*, 633 F.2d 1338, 1349-50 (9th Cir. 1980).

[2] Although the fee-shifting statute in Waterbury was not 42 U.S.C. § 1988 but, rather, section 718 of the Emergency School Aid Act of 1972, 20 U.S.C. § 1617 (repealed 1979), the pertinent language in

(Footnote Continued)

burdened their constituency." *Id.* at 577.[2] As the remedy ultimately adopted in *Waterbury* , a school desegregation case, "bore a substantial resemblance to the plan intervenors supported (indeed, it took the same general approach)," the court concluded that the intervenors "c[a]me within the meaning of the term 'prevailing party.'" *Id.* The *Waterbury* court, per Judge Mansfield, refused to interpret the term "prevailing party" in a fashion that would "severely limit the availability of attorneys' fees to parties whose participation contributed importantly to the creation of remedies in these cases." *Id.* at 576. This is exactly what the intervenors in this case did; in contributing importantly to the creation of the remedies approved by the district court and upheld in our court, they came within the meaning of the term "prevailing party."

The panel majority seeks to distinguish *Waterbury* by saying that there "many members of the intervenor group's constituency in that case asserted . . . a civil rights interest" and that "the intervenors there were seeking to vindicate their own civil rights, not the rights of others." Opinion, p. 9. So too, however, in this case the intervenor group's constituency included the plaintiff class of children asserting a civil rights interest. The intervenors in *Waterbury* were not themselves school children, though some of them were Hispanic. Here, too, in the foster care context, the intervenors were not children but were agencies -- clinicians and administrators who care for thousands of children. As such, the intervenors had duties running to the children that made them stand *in loco parentis*, duties that would be implied by law if they were not already set forth in the New York Statutes. N.Y.

(Footnote Continued)
the two statutes is "virtually identical." *Waterbury*, 605 F.2d at 576. There is therefore no reason not to apply the *Waterbury* court's analysis to a situation arising under section 1988.

Soc. Serv. Law §§ 383-384 (McKinney 1983 & Supp. 1991). This case cannot be distinguished from *Waterbury*.

Furthermore, *Waterbury* cannot be overruled *sub silentio* by a panel majority. Nor should it be overruled.[3] The quotations from the House and Senate Reports used to bolster the position that intervenors who do not assert their own civil rights are not entitled to attorneys' fees seem to me, with all due respect, to have no bearing whatsoever on the question at hand. These statements were not offered in the context of whether intervenors must be asserting their own civil rights but were stated in the much more general context of whether fees should be awarded to prevailing parties generally.

I agree, in short, with the commentator who said,

> It may be argued that th[e] requirement that parties must raise a civil rights claim to recover attorneys' fees should further be limited to situations where a party claims *its own* legal rights are violated, or will be violated by the defendant's acts or the plaintiff's proposed remedy. This limitation, however, seems unnecessary and even counter-productive. First, it has been argued here that certain intervenors should be encouraged to join civil rights actions. Second, the concerns that this limitation evince are already protected by the rules which allow

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[3] Waterbury has been favorably treated in a number of other decisions and criticized in none. *E.g., Frazier v. Merit Systems Protection Bd.*, 672 F.2d 150, 168 (D.C. Cir. 1982); *Seattle School Dist. No. 1 v. State of Washington*, 633 F.2d 1338, 1349-50 (9th Cir. 1980). Commentators, as well, have noted the significance of *Waterbury*. *See Rhode, Class Conflicts in Class Actions*, 34 Stan. L. Rev. 1183, 1229 (1982).

> intervenors to join cases. If the suggested limitation were imposed, it would exclude some desirable parties and would duplicate, in effect, the rules limiting intervention. Not allowing fees to such parties would operate only against those financially unable to join a suit while the limits on intervention would operate equally on all parties.

Tamanaha, *The Cost of Preserving Rights: Attorneys' Fee Awards and Intervenors in Civil Rights Litigation*, 19 Harv. C.R.-C.L. L. Rev. 109, 143 n.130 (1984) (emphasis added). But reading such a limitation into section 1988, as the majority panel does, has implications that go beyond inefficiency and inequity. By threatening to remove suits involving *jus tertii*, associational standing, and overbreadth from the purview of section 1988, this reading displays an insensitivity to the economic incentives Congress wished to foster and weakens the tools available to those who seek to eradicate civil rights violations. In addition, a narrow interpretation of section 1988 may have a ripple effect, weakening the more than 100 other fee-shifting statutes in the United States Code, which courts interpret by drawing upon the principles and case law of section 1988. *See, e.g., Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 559-60 (1986); Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 Tex. L. Rev. 291, 306 (1990).

There is no question that, by its terms, section 1988 only authorizes fee-shifting for those parties seeking to enforce civil rights. Indeed, the court below recognized this principle. *See Wilder*, 725 F. Supp. at 1331 ("It is clear that the purpose of the fee-shifting statute is to encourage the vindication of civil rights, and parties who

are not involved in furthering such purposes should not be entitled to benefit from the statute."). The only proper question, then, is whether intervenors sought to enforce civil rights. The district court found that they did:

> The intervenors did more than just advance their own self-interests. Their participation furthered the purposes of the civil rights statutes by facilitating the formation of a settlement which would safeguard the constitutional rights of the children in the City's care, while assuring that the child care system itself would remain focused on the overall best interests of the children entitled to the protection of the civil rights laws.
>
> Furthermore, the intervenors consistently and forcefully articulated objections addressed to the constitutional and civil rights issues in this litigation. Their efforts helped to vindicate the civil rights of the children and families in the foster care system which they served, not just their own self interests.

Id. at 1331-32. *See also Wilder*, 645 F. Supp. 1292, 1303-04, 1350 (S.D.N.Y. 1986), *aff'd*, 848 F.2d 1338 (2d Cir. 1988). There is ample support for this finding in the record; therefore, we should affirm the district court decision.

I eschew the narrow construction of the term "prevailing party" the majority gives the congressional statute which, after all, in the words of the Senate Report, was "an appropriate response" to *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), S. Rep. No. 1011, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908, 5912. Congress sought to

return to the teaching of *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), that a party who enforced a civil rights statute "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id.* at 402; *see also* Note, *Promoting the Vindication of Civil Rights through the Attorney's Fees Awards Act*, 80 Colum. L. Rev. 346, 353 (1980). The intervenors here were such a party. There is no way in which it can be suggested that to grant them attorneys' fees would be "unjust." There is every reason to follow our precedent -- the *Waterbury* case.

Decision and Judgment of the United States District Court for the Southern District of New York, Dated December 4, 1989

Shirley WILDER, *et al.*,

Plaintiffs

v.

Blanche BERNSTEIN, individually and as Administrator of the New York City Human Resources Administration, *et al.*,

Defendants,

and

Abbott House, et al.,

Intervenors.

No. 78 Civ. 957 (RJW).

United States District Court
S.D. New York.

Dec. 4, 1989.

Intervenors in civil rights action sought recovery of attorney fees. The District Court, Robert J. Ward, J., held that intervenors were prevailing parties entitled to recover attorney fees.

Ordered accordingly.

Polier, Tulin, Clark & Zalk (Stephen Wise Tulin, of counsel), Webster & Sheffield (Donald J. Cohn, Seth M. Lahn, Joseph M. Heppt, Sharon A. Lewis, of counsel), New York City, for intervenors.

Peter L. Zimroth, Corp. Counsel of the City of New York, Norma Kerlin, Asst. Corp. Counsel, New York City, for defendant New York City.

OPINION

ROBERT J. WARD, District Judge.

Once again the Court is asked to decide a controversy stemming from the litigation concerning the provision of child care services by New York City (the "City") to those children requiring placement in institutions and foster homes. The litigation, which at its core revolves around the best interests of the children in the City's child care system, has occupied the courts of this Circuit for the past sixteen years, generating four published opinions prior to this decision.[1] The main protagonists in this ongoing saga are (1) plaintiffs, who represent a class of black Protestant children in need of child care services out of their home, (2) the City and the municipal officials responsible for the City's child care system (collectively the "City defendants"), (3) a group of ninet- -n private child care agencies which intervened in this action (the "intervenors") and (4) a group of administrators of private, religiously affiliated, child care agencies (the

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[1] These decisions are: *Wilder v. Sugarman*, 385 F.Supp. 1013 (S.D.N.Y. 1974) (per curiam) (three-judge panel upheld facial constitutionality of New York State's constitutional and statutory provisions authorizing religious matching for publicly-funded foster care of children); *Wilder v. Bernstein*, 499 F. Supp. 980 (S.D.N.Y. 1980) (plaintiff class certification granted, remaining facial attacks on the validity of New York statutes dismissed); *Wilder v. Bernstein*, 645 F. Supp. 1292 (S.D.N.Y. 1986) (approval of stipulation of settlement) (hereinafter "*Wilder III*"), *aff'd*, 848 F.2d 1338 (2d Cir. 1988) (approval of consent decree upheld on appeal taken by sectarian agencies) (hereinafter "*Wilder IV*").

The history of this litigation has been detailed in *Wilder III* and *Wilder IV*, familiarity with which is presumed, and the Court will not undertake an unnecessary repetition of this chronology.

"sectarian agencies"). This decision will revisit the history of this litigation in the context of the intervenors' motion for an award of attorneys' fees and costs against the City, pursuant to 42 U.S.C. § 1988. The City has cross-moved to dismiss the intervenors' application for fees.[2] For the reasons that follow, the intervenors' motion is granted and the City's cross-motion is denied.

BACKGROUND

Plaintiffs challenged the City's child care system on several constitutional grounds, their final complaint alleging, in essence, that the child care system (1) operated

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[2] A host of motions were initially filed with the Court regarding the entitlement of various parties to attorneys' fees. Plaintiffs filed motions for attorneys' fees and costs pursuant to 42 U.S.C. § 1988 against the City defendants, the sectarian agencies, the intervenors and Lester Kaufman, individually, and as Executive Director of Ohel Children's Home ("Kaufman"). In response, the intervenors filed a motion for sanctions against plaintiffs, pursuant to Rule 11, Fed.R.Civ.P. The intervenors also filed their own motion for attorneys' fees and costs against the City. The City then cross-moved to dismiss the intervenors' application.

On or about June 26, 1989, the City defendants submitted an offer of judgment to plaintiffs, pursuant to Rule 68, Fed.R.Civ.P., in the amount of $1,775,000.00, covering all of plaintiffs' claims for attorneys' fees and costs, except those incurred in the appeals from this Court's decision approving the Stipulation. Plaintiffs accepted the offer of judgment on or about June 27, 1989. A conference was held before the Court on July 21, 1989 to discuss the remaining motions. Pursuant to stipulation, so ordered August 9, 1989, plaintiffs withdrew their motions for attorneys' fees and costs against the intervenors and the sectarian agencies, and the intervenors withdrew their Rule 11 motion against plaintiffs.

Plaintiffs' application for attorneys' fees against Kaufman was withdrawn with prejudice pursuant to stipulation filed in April 1989. A subsequent motion by plaintiffs for attorneys' fees and costs against Kaufman, pursuant to rule 37(b), was also withdrawn with prejudice by stipulation filed in June 1989. Only the intervenors' motion for fees and the City's cross-motion to dismiss remain.

to discriminate against children based on race and religion, (2) amounted to the establishment of religion and, (3) unduly burdened the free exercise rights of Protestant children. They also claimed that defendants had denied the plaintiff class equal access to child care services in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and applicable state law.

The intervenors represent a broad spectrum of foster care clinicians and administrators who together care for approximately 4,600 children.[3] A number of the intervenors were originally named as defendants in the *Wilder* litigation, but, by 1978, these defendants had all been dismissed from the case, many with prejudice.

Shortly before trial was to begin in August 1983, plaintiffs and the City defendants renewed their efforts at settlement. These negotiations proved fruitful and resulted in plaintiffs and the City defendants fashioning a draft stipulation of settlement. In or about January 1984, fourteen of the eventual intervenors, plus a number of other agencies, wrote the City expressing strong objections to the draft stipulation of settlement. The intervenors articulated their concerns with the draft stipulation to the Court and to the parties throughout the winter and early spring of 1984.

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[3] The nineteen not-for-profit child care agencies which comprise the intervenors are: Abott House, Berkshire Farm Center & Services for Children, Brooklyn Home for Children, Brookwood Child Care, The Children's Aid society, The Children's Village, Episcopal Mission Society, Green Chimneys Children's Service, Heartsease Home, Inwood House, Lakeside School, Louise Wise Services, Lutheran Community Services, Puerto Rican Family Association, St. Christopher-Jennie Clarkson Child Care Services, Sheltering Arms Children's Service, Society for Seamen's Children, Spence-Chapin Services to Children, and Talbot Perkins Children's Services.

In April 1984, plaintiffs and the City defendants presented a proposed stipulation of settlement to the Court for approval. The Court then directed that notice of the proposed settlement be given to members of the plaintiff class. The intervenors, whose concerns with the draft had not been addressed in the proposed stipulation, continued to press their objections. They maintained that the proposed stipulation was fundamentally flawed because, *inter alia*, (1) it failed to protect the best interest of the children, (2) it unconstitutionally discriminated against children whose parents exercised a religious preference in child care, and (3) it failed to take into account the complex problems presented by the placement of children and the practical limitations inherent in the child care system. The intervenors were granted leave to intervene to oppose the proposed stipulation by order of the Court filed June 15, 1984.

The objections the intervenors presented to the Court concerning the proposed stipulation were comprehensive, and were supported by detailed affidavits from child care professionals. The affidavits and supporting materials presented by the intervenors provided the Court and the parties with important background and insight on the clinical and administrative realities confronting the child care system. Negotiations concerning the content of the proposed stipulation, in which the intervenors played an integral role, continued throughout the summer. Beginning on August 6, 1984, the Court commenced a hearing on the fairness, reasonableness and adequacy of the settlement. As this Court noted in *Wilder III*, sparked primarily by the criticisms and suggestions of the intervenors, the parties embarked on a series of meetings in open court to attempt to resolve the numerous legal and child care issues involved with the proposed stipulation of settlement.

The intervenors reached agreement on certain general topics with plaintiffs and the City defendants, and suggested specific changes that could be made in the original settlement agreement to resolve or mitigate many of the remaining problems they had identified in their original objections. The parties continued to negotiate around the various concrete proposals offered by the intervenors. These efforts proceeded throughout the fall of 1984 and, on January 2, 1985, a second proposed stipulation of settlement, supported by the intervenors, was submitted to the Court. The finalized version of the stipulation of settlement was ultimately approved by the Court in *Wilder III*, over the opposition of the sectarian agencies.

The significant impact the intervenors had on the ultimate Stipulation was detailed throughout the Court's decision in *Wilder III*. For example, it was noted that:

> The Intervenors' original comments proved extremely valuable to the Court, not only because they offered a fresh perspective on the day-to-day operation of New York City's child care system from the agency clinician's point of view ..., but because their criticism of the original settlement proposal was concrete, comprehensive and constructive.

Wilder III, 645 F.Supp. at 1346.

> The intervening agencies, as non-parties vis-a-vis the underlying constitutional claims in the lawsuit, are the sole participants in this litigation who have been in a position to address freely and undistractedly the child care concerns that were prompted by the original settlement proposal. At the same time, their direct participation in the New York City foster care system, and their on-

> going contact with the children in care, give them the ability and incentive to comment authoritatively on the likely impact of the settlement on agency administrators and clinicians and on the children they serve. The Court benefitted immeasurably from the voluntary agency's perspective. The drafters of the original settlement undeniably benefitted from the intervenors' constructive criticism and suggestions.

Id. at 1350.

More specifically, the Court found the contributions made by the Intervenors were essential to the creation of the final Stipulation.

> The settlement originally presented to the Court ... was clearly problematic... The clinical concerns voiced by the intervenors and others raised serious questions in the Court's mind about both the extent to which child care issues had been fully explored ... and the extent to which the voluntary agencies had been allowed to participate meaningfully in the initial negotiations. The original settlement proposal therefore was unacceptable on several levels....
>
> The general outlines of the stipulation now before the court do not differ greatly from those of the original settlement.... Within this broad outline, however, the Stipulation reflects numerous changes--some minor, some substantial--that address virtually all of the concerns raised by the intervenors and other child care administrators ... who commented on the original settlement.

Id. at 1347-48.

The intervenors worked to promote a more viable solution to the problems presented by the foster care system in New York, while at the same time assuring that the best interests of all children in the system were taken into account. They succeeded in forestalling entry of the proposed stipulation negotiated by plaintiffs and the City which did not satisfy their objections, and prevailed, through negotiations, in their proposals to modify the settlement to ameliorate the constitutional, clinical, and practical stumbling blocks they had identified in the original stipulation.[4] While the settlement was obviously the result of more than just the work of the intervenors, they played an essential role in forging the final version of the Stipulation which was acceptable to all the parties except the sectarian agencies, and approved by this Court and the Second Circuit.

Intervenors now seek to recover attorneys' fees and costs of their work in crafting and enforcing the Stipulation.

DISCUSSION

Pursuant to the Civil Rights Attorneys' Fees Awards Act of 1976, a district court, in its discretion, may award attorneys' fees and costs to the prevailing party in any action or proceeding to enforce certain civil rights acts. 42 U.S.C. § 1988.[5] The parties do not dispute that section 1988 applies to this litigation.

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[4] Wilder III summarized twenty clinical concerns raised by intervenors to the first proposed settlement, and listed ten particularly noteworthy modifications of the settlement draft made to alleviate these concerns. *Wilder III* at 1346-49. In addition, many other points pressed by the intervenors resulted in modification of the proposed stipulation. See Affidavit of Stephen Wise Tulin, filed on March 20, 1989 at ¶ 24.

[5] Section 1988 states, in pertinent part, that:

(Footnote Continued)

A. Entitlement to Fees-Intervenors as Prevailing Parties:

The statutory language of section 1988 creates a presumption in favor of fee awards, *DiFilippo v. Morizio*, 759 F.2d 231, 234 (2d Cir. 1985), and a prevailing party is ordinarily entitled to recover fees and costs unless there are special circumstances which would render such an award unjust. *See Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968).

It is clear that a party may prevail for purposes of section 1988 through settlement. *Maher v. Gagne*, 448 U.S. 122, 129, 100 S.Ct. 2570, 2574, 65 L.Ed.2d 653 (1980) (consent decree which made no determination that the defendant had violated the plaintiff's constitutional rights was nonetheless sufficient to form the basis for a finding that the plaintiff was a prevailing party entitled to attorneys' fees). As noted in *Maher v. Gagne*, *supra*, 448 U.S. at 129, 100 S.Ct. at 2574, the Senate Report accompanying section 1988 stated that "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." Sen. Rep. No. 1011, 94th Cong., 2d Sees. 5 (1976), reprinted

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(Footnote Continued)

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Section 1988 has been interpreted in the same manner as the other fee-shifting provisions for particular civil rights claims which contain the "prevailing party" language. *See Independent Federation of Flight Attendants v. Zipes*, ___ U.S. ___, 109 S.Ct. 2732, 2735 n.2, 105 L.Ed.2d 639 (1989).

in 1976 U.S.Code Cong. & Admin. News, 5908, 5912. Indeed, "congress made clear its concern that civil rights plaintiffs not be penalized for 'helping to lessen the docket congestion' by settling cases out of court." *Evans v. Jeff D.*, 475 U.S. 717, 733, 106 S.Ct. 1531, 1540, 89 L.Ed.2d 747 (1986) (holding that section 1988 does not bar the waiver of attorneys' fees as part of a settlement) (quoting *Marek v. Chesny*, 473 U.S. 1, 10, 105 S.Ct. 3012, 3017, 87 L.Ed.2d 1 (1985)).

The Supreme Court has recently explained that a party meets the threshold requirement necessary to be considered a prevailing party under section 1988 if he or she succeeds on "any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Texas States Teachers Assn. v. Garland Independent School District*, ___ U.S. ___, 109 S.Ct. 1486, 1493, 103 L.Ed.2d 866 (1989) (rejecting the "central issue" test for determining an award of attorneys' fees). *See also*, *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 St.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983).

> The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute.

Texas States Teachers Assoc. v. Garland Independent School District, *supra*, 109 S.Ct. at 1493.

The nature of much civil rights litigation does not lend itself to complete success by plaintiffs or defendants, and the input of intervenors may be necessary for a just remedy. While most of the cases dealing with the statutory award of attorneys' fees pursuant to section 1988 are concerned with awards to plaintiffs, an intervenor may also be a prevailing party entitled to fees and

costs. *E.g. United States v. Board of Education of Waterbury*, 605 F.2d 573, 576 (2d Cir. 1979).[6]

In *Waterbury*, an action concerning school desegregation, an organization comprised of parents and community leaders, along with several individuals, were allowed to intervene in the lawsuit after the defendants had been found liable, a consent decree had been filed and an initial desegregation plan was proposed by the defendants. Intervention was granted for the limited purpose of allowing the intervenors to protect the interests of the Hispanic community and to participate in the development of remedial measures under the consent decree. *Id.* at 574. Nonetheless, the intervenors were found to be prevailing parties, entitled to a fee award. *Id.* at 577.

The Second Circuit described the circumstances surrounding the intervention in *Waterbury* as follows:

> Intervenors entered this lawsuit to oppose a plan which unfairly burdened their constituency, and which was not being opposed by the government. In this they succeeded. They contested several later proposals, and worked in support of a plan which better served their valid interests. The

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[6] An examination of the legislative history of section 1988 readily illustrates that Congress contemplated fee awards would be available to intervenors in certain circumstances.

> In the large majority of cases the party or parties seeking to enforce such rights will be the plaintiffs and/or plaintiff intervenors. However, in the procedural posture of some cases the parties seeking to enforce such rights may be the defendants and/or defendant intervenors.

S.Rep. No. 1011, 94th Cong., 2d Sess. 4, reprinted in 1976 U.S.Code Cong. & Admin.News, 5908, 5912 n. 4.

> remedy ultimately adopted bore a substantial resemblance to the plan intervenors supported (indeed it took the same general approach) .... In light of the success of intervenors in these respects, we conclude that they come within the meaning of the term "prevailing party."

*Id.*The Second Circuit emphasized the importance of allowing intervenors to recover attorneys' fees when they further the purposes of the civil rights statutes by noting that:

> [w]ere we to interpret "prevailing party" as meaning only the party which established the liability of the defendants, or the party which proposed the plan ultimately adopted, we would severely limit the availability of attorneys' fees *to parties whose participation contributed importantly to the creation of remedies* in these cases. We would discourage activity essential to the realization of the congressional purpose of combating discrimination.

Id. at 576-77. (Emphasis added). *See also*, *Plummer v. Chemical Bank*, 592 F.Supp. 1168, 1171-72 (S.D.N.Y. 1984) (intervenors who took active role in all facets of process, including participation in hearings in which they opposed a proposed settlement, and whose efforts ultimately resulted in a consent decree which represented a fairer document for the entire class, were prevailing parties for fee award); *Morgan v. McDonough*, 511 F.Supp. 408, 413-14 (D.C. Mass. 1981) (intervening organization, which sought to vindicate the civil rights of its clients and made a significant contribution to the formulation of a workable remedy, was a prevailing party entitled to attorneys' fees.)

The City does not dispute that the intervenors made important contributions to the final Stipulation, as clearly documented in *Wilder III*, but claim they are not entitled to fees because they never alleged a violation of their own constitutional rights. The City charges that the intervenors joined the litigation only to promote their own self-interests in eliminating paperwork, modifying the system of ranking agencies, and protecting their contractual rights with the City, and that these are not interests which should be compensated under section 1988.

It is clear that the purpose of the fee-shifting statute is to encourage the vindication of civil rights, and parties who are not involved in furthering such purposes should not be entitled to benefit from the statute. *See Russo v. New York*, 672 F.2d 1014, 1022-23 (2d Cir.1982) (plaintiff who lost on civil rights claim, but prevailed on similar state law claim, was not entitled to attorneys' fees under section 1988); *Gagne v. Enfield*, 734 F.2d 902, 904 (2d Cir. 1984) (same).[7]

However, the City's contentions concerning the scope of the intervenors' participation in the litigation are not borne out by the record. The intervenors did more than just advance their own self-interests. Their participation furthered the purposes of the civil rights statutes by facilitating the formation of a settlement which would safeguard the constitutional rights of the

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[7] *Cf. Independent Federation of Flight Attendants v. Zipes, supra*, 109 S.Ct. at 2737, n.4. In *Zipes* the Supreme Court held that attorneys' fee may be assessed against a blameless intervenor who was not found liable to plaintiff only if the intervenor's action was frivolous, unreasonable, or without foundation. *Id.* at 2736. In responding to the dissent, the majority noted that this heightened standard for the award of fees might not apply if the intervenor was an intermeddler who did not intervene to protect his or her own constitutional or statutory rights. *Id.* at 2737, n. 4.

children in the City's care, while assuring that the child care system itself would remain foeused on the overall best interests of the children entitled to the protection of the civil rights laws. The contributions made by the intervenors were essential to the creation of a just and workable remedy, exactly the type of activity sought to be promoted by the civil rights statutes. *See United States v. Board of Education of Waterbury*, *supra*, 605 F.2d at 577.

Furthermore, the intervenors consistently and forcefully articulated objections addressed to the constitutional and civil rights issues in this litigation. Their efforts helped to vindicate the civil rights of the children and families in the foster care system which they served, not just their own self interests. They succeeded in obtaining modifications in the initial settlement proposal on virtually every objection they raised, and many of these modifications went directly to benefit the children in the child care system. As a result of their labor, a "material alteration of the legal relationship of the parties in a manner which Congress sought to promote," *Texas State Teachers Assoc. v. Garland Independent School District*, *supra*, 109 S.Ct. at 1493, was effectuated. Accordingly, the Court concludes that the intervenors are prevailing parties under section 1988, entitled to an award of attorneys' fees and costs.[8]

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[8] A prevailing party is entitled to attorneys' fees and costs unless special circumstances exist to make such an award unjust. *See Newman v. Piggie Park Enterprises, Inc.*, *supra*, 390 U.S. at 402, 88 S.Ct. at 966. The City defendants assert that the acceptance by plaintiffs of their offer of judgment includes compensation to plaintiffs for costs associated with litigating against the intervenors and, therefore, any further award to the intervenors from the City would result in an impermissible windfall to the intervenors. This argument is misguided. There is no indication that plaintiffs have received compensation and the City for time spent litigating against the intervenors. In any event, awarding a fair fee to the intervenor will not result in their retaining an impermissible windfall.

B. The Amount of the Fee Award:

The Supreme Court recently articulated the following summary of the legal standards for determining the amount of an appropriate fee award.

> A reasonable attorney's fee under § 1988 is one calculated on the basis of rates and practices prevailing in the relevant market, *i.e.*, "in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation," *[Blum v. Stenson*, 465 U.S. 886, 896, n. 11, 104 S.Ct. 1541, 1547, n.11, 79 L.Ed.2d 891 (1984), and one that grants the successful civil rights plaintiff a "fully compensatory fee," [*Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S.Ct. 1933, 1940, 76 L.Ed.2d 40 (1983)], comparable to what is "traditional with attorneys compensated by a fee-paying client." S.Rep. No. 94-1011, p. 6 (1976), U.S.Code Cong. & Admin. News 1976, pp 5908, 5913.

Missouri v. Jenkins, ___ U.S. ___, 109 S.Ct. 2463, 2470, 105 L.Ed.2d 229 (1989).

The framework for establishing the amount of an attorneys' fees award under the federal civil rights fee shifting statute is found in the lodestar approach. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 563-66, 106 S.Ct. 3088, 3097-99, 92 L.Ed.2d 439 (1986); *Hensley v. Eckerhart, supra*, 461 U.S. at 433, 103 S.Ct. at 1939. The lodestar amount is calculated by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate of compensation for each attorney involved. This calculation serves as a useful starting point for determining the amount of a reasonable fee, as it provides an objective basis on

which to make an initial estimate of the value of a lawyer's services. *Hensley v. Eckerhart*, *supra*, 461 U.S. at 433, 103 S.Ct. at 1939.

The ultimate amount of the fee must be determined on the facts of each case, *id.* at 429, 103 S.Ct. at 1937, and the lodestar amount may be adjusted based on such factors as adequate documentation of hours spent, reasonableness of hours expended, and reasonableness of rate. *See Carrero v. New York City Housing Authority*, 685 F.Supp. 904, 906 (S.D.N.Y. 1988).[9] Once the applicant for a fee award has established the reasonableness of the claimed rate and the number of hours expended, the resulting lodestar figure is presumed to be the reasonable fee to which counsel is entitled. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, *supra*, 478 U.S. at 564, 106 S.Ct. at 30; *Blum v. Stenson*, *supra*, 465 U.S. at 897, 104 S.Ct. at 15.

The intervenors seek (1) $416,052.50 in attorneys' fees relating to the substance of this litigation and an enhancement of this amount by a multiplier of 1.75 to $728,091.88; (2) $103,677.50 in attorneys' fees incurred in pursuing the fee application ("Fees for Fees"); and (3) $17,020.59 in costs. *See* Letter from Joseph M. Heppt

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[9] In calculating the lodestar, the following factors may be considered by the Court: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount of involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *See Hensley v. Eckerhart*, *supra*, 461 U.S. at 430, n. 3, 103 S.Ct. at 1938, n. 3; *United States Football League v. National Football League*, 887 F.2d 408 (2d Cir. 1989).

dated November 13, 1989, filed November 27, 1989.[10] The City objects to this request on a number of grounds.

First, the City argues that the intervenors have failed to supply contemporaneous time records and therefore are not entitled to recover attorneys' fees.

> All applications for attorney's fees, whether submitted by profit-making or non-profit lawyers, for any work done after the date of this opinion [June 15, 1983] should normally be disallowed

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[10] Intervenors indicate that their total fee request amounts to $810,108.50. The City, however, maintains that if the intervenors were to receive full compensation for all the time they claim plus a multiplier of 1.75, the total fee request would be $834,756.61. Affidavit of Norma Kerlin, filed November 17, 1989 at ¶ 3, n. 1. The Court's own calculations, based on the latest figures presented in the intervenors' November 13, 1989 letter, indicate that the total fee request, exclusive of costs, amounts to $831,-769.38.

This sum was calculated as follows:

1. Opposition to the proposed stipulation and negotiating the final stipulation:	$350,740.00
2. Defense of the Stipulation on appeal:	$28,403.75
3. Enforcement of the Stipulation, including opposition to the initial City RFP:	$ 36,908.75
Total (excluding Fees for Fees)	$416,052.50
Total (excluding Fees for Fees) enhanced by a multiplier of 1.75:	$728,091.88
5. Fees for Fees:	
(a)Up to March 17, 1989:	$68,872.50
(b)From March 17, 1989 to November 13, 1989:	$34,805,00
	$103,677.50
Total Fee Request:	$831,769.38

> unless accompanied by contemporaneous time records indicating, for each attorney, the date, the hours expended, and the nature of the work done.

New York State Association for Retarded Children, Inc. v. Carey, 711 F.2d 1136, 1154 (2d Cir. 1983). Contemporaneous time records are necessary so that the Court is not faced with an impossible task when asked to determine an appropriate fee amount, and lawyers are not required to expend even more time reconstructing the past in assembling the fee application. *Id.* at 1147-48. The burden to present such records to the Court rests squarely on the party requesting remuneration. *Hensley v. Eckerhart*, *supra*, 461 U.S. at 437, 103 S.Ct. at 19; *Carrero v. New York City Housing Authority*, *supra*, 685 F.Supp. at 909.

Intervenors submitted verbatim transcriptions of the daily entries made in the diaries of every attorney, paralegal and summer associate who worked on this case. Exhibit C annexed to Affidavit of Donald J. Cohn, filed September 15, 1989; Exhibit 7 annexed to Affidavit of Stephen Wise Tulin, filed September 1, 1989. The original diaries have not been presented to the Court.[11] Lead counsel for the intervenors, Donald J. Cohn ("Cohn") and Stephen Wise Tulin ("Tulin"), have attested to the fact that the documentation presented to the Court

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[11] The intervenors maintain that the original diary entries were not produced because these diaries contain confidential billing information regarding other clients. The intervenors claim they offered to work out an arrangement whereby the City would have been allowed access to the diaries in order to randomly check entries, but the City did not respond to this suggestion. Affidavit of Donald J. Cohn, filed September 15, 1989 at ¶ 4. The intervenors also state that they would have produced redacted versions of the original diary entries if the City had agred to bear the cost of this procedure. *Id.*

concerning the amount and the description of the time spent by the intervenors' attorneys consisted of the actual entries as they appeared in the daily diaries of the individuals in question, not summaries or reconstructions of these entries. Affidavit of Donald J. Cohn, filed September 15, 1989 at ¶¶ 5-7; Affidavit of Stephen Wise Tulin, filed September 1, 1989 at ¶ 8. *See also*, Affidavit of Joseph M. Heppt, filed September 1, 1989 at ¶ 7. Based on these assurances, the Court concludes that the intervenors have satisfied the requirement of producing contemporaneous billing records. *Cf. United States Football League v. National Football League*, 704 F.Supp. 474, 477 (S.D.N.Y.) (re-typed computer records satisfied contemporaneous time record requirement), *aff'd*, 887 F.2d 408, 415 (2d Cir. 1989).

Second, the City argues that the intervenors are not entitled to enforce the Stipulation and, therefore, should not be entitled to fees after December 19, 1985, when the executed consent decree was filed with the Court. The Court disagrees. The Stipulation, to which the intervenors are signatory parties, gives them the right to ensure that those terms which affect their interests are properly implemented. Paragraph 75 of the Stipulation provides that plaintiffs shall exercise reasonable efforts to ascertain whether voluntary compliance can be obtained prior to seeking judicial redress for alleged noncompliance by defendants with the terms of the Stipulation. This provision, contrary to the City's assertions, does not exclude the intervenors from enforcing the Stipulation. Accordingly, the intervenors' claim for fees did not terminate upon filing the Stipulation with the Court.

Third, the City contends that it is not liable for any attorneys' fees incurred by the intervenors in defending the Stipulation on appeal. On this point, the Court

agrees. The appeal was filed solely by the sectarian agencies. The Court does not believe it would be reasonable to require the City, a signatory party to the Stipulation, to be responsible for any of the fees expended in defending the Stipulation against appellate challenge by parties over whom the City had no control. Accordingly, the $28,403.75 in attorneys' fees claimed by the intervenors in connection with the appeal will be excluded from the fee award.

Next, the City challenges the hourly rates sought by intervenors. The intervenors have requested hourly rates which are equivalent to the actual rates billed by their counsel to paying clients during the relevant time periods. Nonetheless, the City challenges these rates as excessive. In determining the elements of reasonable attorneys' fees, courts have consistently looked to the marketplace as a guide, *Missouri v. Jenkins*, *supra*, 109 S.Ct. at 2470, and in determining whether the requested rates fall within the prevailing market rates, "rates charged in private representations may afford relevant comparisons." *Blum v. Stenson*, *supra*, 465 U.S. at 896, n. 11, 104 S.Ct. at 1547, n. 11.

The intervenors are entitled to a reasonable hourly rate calculated in accordance with the prevailing marketplace rates in the New York community for lawyers of similar experience and reputation engaged in similar litigation. The hourly rate actually charged to clients by an attorney is a strong indication of the prevailing market rate for that attorney's work, which implicitly accounts for the attorney's skill and reputation in the community. *See Laffey v. Northwest Airlines*, 746 F.2d 4, 24 (D.C. Cir. 1984) (rate actually charged by a prevailing party's counsel in private practice will provide fair compensation when used in determining a fee award as long as the rate falls within the range of rates charged by other

firms in the community for similar work), *cert. denied*, 472 U.S. 1021, 105 S.Ct. 3488, 87 L.Ed.2d 622 (1985); *Barcia v. Sitkin*, 683 F. Supp. 353, 357 (S.D.N.Y. 1988) (in determining reasonable hourly rate, court would look first to any existing schedule of fees charged by counsel for services performed in previous or other cases); *Berkman v. City of New York*, No. 79-1813, slip op. at 9-10 (S.D.N.Y. November 25, 1985) (annexed as Appendix 1 to the City's Memorandum of Law, filed August 11, 1989). Still, the rate an attorney charges paying clients is not necessarily the rate which should be compensated under section 1988, because the services required by nonpaying clients may well differ from those required by paying clients. *See McCann v. Coughlin*, 698 F.2d 112,130 (2d Cir. 1983).

The Court concludes that the hourly rates charged by Polier, Tulin, Clark and Zalk for Tulin's time in this litigation are appropriate, as they fall well within the range of hourly rates charged by partners at major law firms in Manhattan during the relevant time periods. *See* Exhibits K, L, O, P annexed to Affidavit of Marcia Robinson Lowry, filed February 24, 1989. These rates are especially reasonable given the amount of experience lead counsel for the intervenors brought to this case.[12]

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[12] Tulin graduated from Yale Law School in 1954, cum laude, Order of Coif, having been Comment Editor of the Yale Law Journal. He clerked for the Honorable Edward Weinfeld of the Southern District of New York in 1954 and 1955. He has been a member of the bar for 34 years, and a partner in his current firm since 1961. Among his other activities, Tulin has been involved in the legal aspects of child care for more than twenty-five years, acting as general counsel to Louise Wise Services since 1976, and has assisted in drafting certain laws regarding family law and child care in New York State. Affidavit of Stephen Wise Tulin, filed March 20, 1989 at ¶¶ 2-6. Cohn is a 1955 graduate of Yale Law School where he was an editor of the Yale Law Journal. Upon graduation

(Footnote Continued)

The intervenors have sought to charge Cohn's time at higher rates than those charged for Tulin's, presumably based on the differences in their respective firm's actual charges, not the contributions made by each to the settlement. The Court finds that the hourly rates requested by Tulin most reasonably reflect the prevailing rate for such work in the relevant legal community. Accordingly, the Court will adjust Cohn's hourly rates to the same level as those rates requested by Tulin.[13]

The City has also attacked as inflated the hourly rates of Tracy Miller, Seth Lahn and S.A. Lewis, three

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(Footnote Continued)

he entered private practice with the firm now known as Webster & Sheffield, and has remained with that firm to the present time, with the exception of several years spent in the United States Attorney's Office for the Southern District of New York. Webster & Sheffield has represented the Children's Aid Society and Cohn asserts that he has been involved in several child care matters during his time in private practice. Affidavit of Donald J. Cohn, filed March 20, 1989 at ¶¶ 20-21.

[13] The rates charged for Tulin's time and the rates charged for Cohn's time are set forth below.

Year	Tulin's Hourly Rate	Cohn's Hourly Rate
1984	200.00	250.00
1985	225.00	250.00
1986	225.00	300.00
1987	250.00	300.00
1988	250.00	325.00
1989	250.00	325.00 and 350.00

The value of Cohn's time on the substance of this litigation, at rates adjusted to comport with those charged by Tulin, is calculated below. The rates and amount of compensation requested by the intervenors appear in parentheses.

(Footnote Continued)

associates for Webster & Sheffield who were involved in this litigation on behalf of the intervenors. The rates charged by the intervenors for these individuals, as well as the rates charged for the time expended by other associates and paralegals for whom the intervenors seek compensation, are also the actual rates intervenors' counsel charged to paying clients.[14] These rates fall within the parameters of the hourly rates charged by similar firms in New York City for associates and the Court finds them to be reasonable. Accordingly, no adjustment will be made to these rates.

Finally, the City contends that the intervenors have not met their burden of showing that all the hours for which they seek compensation are properly documented, or that they exercised appropriate billing judgment in incurring the number of hours expended on this litigation. The Supreme Court in *Hensley* has outlined certain prerequisites for determining the amount of a reasonable fee.

> The party seeking an award of fees should submit evidence supporting the hours worked and the rates claimed. Where the documentation of

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(Footnote Continued)

Year	Hours	Rate $	Amount $
1984	279.00	200.00	55,800.00
		(250.00)	(69,750.00)
1985	15.25	225.00	3,431.25
		(250.00)	(3,812.50)
1986	17.50	225.00	3,937.50
		(300.00)	(5,250.00)

[14] The City has not challenged the hourly rates charged by the other associates, summer associates and paralegals included in the intervenors' fee request. Instead, the City maintains that none of the time these additional individuals expended is compensable.

> hours is inadequate, the district court may reduce the award accordingly.
>
> The district court also should exclude from this initial fee calculation hours that were not "reasonably expended." [citation omitted] Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in a private practice is ethically obligated to exclude such hours form his fee submission. "In the private sector, 'billing judgment' is an important consideration in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority." [citation omitted]

Hensley v. Eckerhart, *supra* 461 U.S. at 434, 103 S.Ct. at 1939 (emphasis in original).

The time records submitted by the intervenors concerning work performed on the substance of this litigation support, to a large extent, the amount of their attorneys' fees request. A great majority of the entries are sufficiently documented and reflect reasonable expenditures of time given the issues and the circumstances surrounding negotiating and enforcing the Stipulation. The City, however, has identified a number of entries in the time records which fail adequately to describe the nature of the work performed. These entries are too vague to merit compensation. *See United States Football League v. National Football League*, *supra*, 704 F.Supp. at 477 (vagueness in documentation of time records will result in a 10% reduction in the fee award).

In addition, it is apparent upon inspection of the time records that an excessive amount of time was spent by the intervenors' counsel participating in conferences with clients and co-counsel. While the Court acknowledges the logistical problems involved in serving nineteen child care agency clients, not all of the conferences between counsel should be borne as an expense by the City. Similarly, the participation of both lead counsel for the intervenors at the same time was essentially duplicative, although much of this duplication was mitigated by the division of work between counsel.[15] It is proper to reduce a fee request when a party seeks compensation for efforts which essentially duplicated another attorney's work. *New York Association for Retarded Children v. Carey, supra*, 711 F.2d at 1146. Furthermore, the intervenors initially adopted certain positions in opposition to the proposed stipulation which were later abandoned, including a challenge to this Court's authority to grant relief that would substantially alter the child care system in New York City. *See* Exhibits C, D & E, annexed to Affidavit of Marcia Robinson Lowry, filed June 8, 1989. Time spent on these issues does not merit compensation under section 1988. Accordingly, the Court believes it is appropriate to reduce the amount of the fee request by twenty percent, from $368,892.00[16] to $295,113.60.

The intervenors argue that an enhancement of the fee award by a multiplier of 1.75 is appropriate given

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[15] Tulin focused on the clinical aspects of the issues involved with the child care system and Cohn concentrated on the constitutional concerns raised by the Stipulation. *See* Affidavit of Donal J. Cohn, filed March 20, 1989 at ¶ 20.

[16] This figure represents the amount sought for work on this litigation less the amount spent on defending the Stipulation on appeal and adjusted to reflect the Court's modification of Cohn's billing rate.

their degree of success in opposing the initial proposed stipulation and negotiating the final Stipulation. The Supreme Court has explained that an enhancement of a fee award is proper only in certain rare and exceptional cases. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, *supra*, 478 U.S. at 565, 106 S.Ct. at 3098; *Blum v. Stenson*, *supra* 465 U.S. at 898-901, 104 S.Ct. at 1548-50. *See also Krieger v. Gold Bond Building Products*, 863 F.2d 1091, 1099 (2d Cir. 1988). The purpose of the fee-shifting statute is not exactly to replicate a private fee arrangement but to ensure that private parties will be able to retain counsel to further the objectives of the civil rights statutes. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, *supra*, 478 U.S. at 565, 106 S.Ct. at 3098. The applicant bears the burden of overcoming the presumption that the lodestar reflects a reasonable fee award and establishing that an enhancement is appropriate. *See Soler v. G & U, Inc.*, 658 F. Supp. 1093, 1102-03 (S.D.N.Y. 1987).

In the context of this case, the Court does not view an enhancement over and above the reasonable fee assessed as warranted based on the success of the intervenors. The intervenors, plaintiffs and the City all ultimately collaborated to create the Stipulation approved by the Court. The significant contributions of the intervenors to the creation of the Stipulation and the expertise and skillful advocacy added to the litigation by intervenors' counsel were important ingredients in achieving the results obtained, but are factors which have been taken into consideration in arriving at the adjusted fee award.

Intervenors' counsel have indicated to the Court that they had no retainer agreements with their clients concerning this litigation, and argue that this created a risk of loss which justifies an enhancement of the fee

award. Affidavit of Stephen Wise Tulin, filed September 1, 1989, at ¶ 7. In and of itself, however, a contingency arrangement is not a sufficient basis for increasing the amount of the fee award above the lodestar. *Lewis v. Coughlin*, 801 F.2d 570, 575 (2d Cir. 1986). The risk of loss does not merit an enhancements in this case, because the intervenors have not even attempted to show that without the possibility of enhancement competent counsel might have refused to represent then, thereby denying them effective access to the courts. *See Friends of the Earth v. Eastman Kodak Co.*, 834 F.2d 295, 298 (2d Cir.1987).

One additional factor to be considered in determining whether to enhance a fee award is delay in payment, because compensation received several years after services were rendered is not equivalent to the same compensation received at the time the services were performed. *Missouri v. Jenkins*, *supra*, 109 S.Ct. at 2469. The Court is mindful of the need to insure effective access to judicial process and the importance of not penalizing attorneys who choose to represent parties in complex and lengthy litigation which furthers the purposes of the civil rights laws. In the Court's view, however, the amount of the fee award granted intervenors provides then with full compensation.

Intervenors are also entitled to compensation for the attorneys fees incurred in preparing the fee application, see *New York Association for Retarded Children v. Carey*, *supra*, 711 F.2d at 1148, but the amount of remuneration sought for Fees for Fees in this case must be reduced. Intervenors seek $103,677.50 for work performed on the fee application, approximately twenty-five percent of their total requested fee award. This figure overstates the amount reasonably recoverable. The City argues that the number of individuals involved in the fee

application was excessive, much of the work performed by these individuals was duplicative, some of the time attributed to the fee application against the City included time spent litigating against the sectarian agencies and plaintiffs regarding fees, and much of the time requested is inadequately documented. The Court concurs with at least some of these objections, noting, in particular, the large number of individuals involved in preparing the application, the time these individuals expended familiarizing themselves with the case, and the inadequate descriptions accompanying certain of the time entries. In addition, there were several discrepancies in the figures asserted in the fee application materials presented by the intervenors.[17] Moreover, the intervenors seek considerable reimbursement for time involved with purely administrative tasks that was billed at relatively high rates. Accordingly, the Court believes it is appropriate to reduce the amount sought in connection with the fee application by forty percent, from $100,458.751[18] to $60,275.25.

The intervenors seek $17,020.59 in costs. They have submitted summaries of the expenses they allegedly incurred in this case, but failed to submit detailed documentation of the reimbursement request. *See In re*

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[17] Compare, Affidavit of Stephen Wise Tulin, filed September 1, 1989 at ¶ 2(b)2, with Affidavit of Donald J. Cohn, filed March 20, 1989 at ¶¶ 27-29 and Affidavit of Joseph M. Heppt, filed September 1, 1989 at ¶ 5 (all presented slightly different summaries of the amounts sought by the intervenors). See also, Schedule C, annexed to Letter from Joseph M. Heppt dated November 13, 1989, filed November 27, 1989 (total value of Cohn's time was slightly miscalculated, and total value of additional time spent on fee application was tallied incorrectly); Schedule B, annexed to id.

[18] This figure represents the amount sought for the fee application, adjusted to reflect Cohn's modified billing rate.

Agent Orange Product Liability Litigation, 611 F.Supp, 1296, 1314 (E.D.N.Y.1985) *aff'd in part, rev'd in part*, 818 F.2d 226 (2d Cir. 1987). Indeed, for certain of the expenditures, the intervenors admit that documentation is not available, and no reconstruction of these expenses has been undertaken. The disbursement incurred by a prevailing party's counsel may be compensated when these expenditures add to the proceeding, and are not part of the attorneys' ordinary overhead. *Carrero v. New York City Housing Authority, supra*, 685 F.Supp. at 909. Due to the inadequate documentation concerning the expenses, the Court is unable to ascertain precisely how much of these costs are compensate. Accordingly, the Court will likewise reduce the amount of compensable disbursements by forty percent, from $17,020.59 to $10,212.35.

CONCLUSION

The intervenors are prevailing parties under section 1988, entitled to an award of attorneys' fees in the amount of $355,338.85 and disbursements in the amount of $10,212.35.

Settle order on notice.

Supreme Court, U.S.
FILED
SEP 29 1992
OFFICE OF THE CLERK

No. 92-419

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ADMINISTRATOR OF THE NEW YORK CITY DEPARTMENT OF HUMAN RESOURCES, *et al.*,

Petitioners,

VS.

ABBOTT HOUSE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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September 29, 1992

BEST AVAILABLE COPY

Question Presented

Where Intervenors prevailed on the merits in vindicating the constitutional rights of the 4,600 children entrusted to their care, must they be denied counsel fees solely because they asserted no violation of their own corporate rights?

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Petitioners,

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, (hereafter "Intervenors"), 19 not-for-profit child care agencies who prevailed in vindicating the constitutional rights of 4,600 children in their care, respectfully urge the Court to deny the petition for a writ of certiorari for the reasons stated below.

RESTATEMENT OF THE CASE

The Petition misstates the case by both commission and omission. Hence we restate it here.

Petitioner (hereafter the "City") seeks a writ of certiorari to review an order of the Court of Appeals holding respondents entitled to counsel fees but remanding the case to the District Court to recompute the fees to be allowed.

In 1973, plaintiffs' sued not only the City and religiously affiliated child care agencies, but also virtually every child care agency in the City of New York, including many of the Intervenors.

Since none of those Intervenors discriminated (JA 183-184),[1] they were dismissed as defendants in 1974. However, the judgments of dismissal reserved to some of them full party status on any relief that might be granted (A-8) — a fact omitted from the Petition. They were hardly "volunteers." See Petition, p. 13.

Ten years later, when those Intervenors obtained a copy of the settlement negotiated exclusively by the City and plaintiffs, they found it seriously deficient. At the suggestion of the District Court, they conferred with the City and plaintiffs to seek modifications of the proposed settlement to protect the rights of the children in their care. However, the City and plaintiffs flatly refused to change the settlement in any respect (A-8, JA 302, W 1851-1853).

Thus, those Intervenors, joined by others who had reserved no rights or did not exist in 1973, had no choice but to intervene under Rule 24 and file objections, since their deep concerns for the rights of the children in their care would otherwise be ignored by the existing parties (JA 152-153).

These Intervenors stand in *loco parentis* to the 4,600 children in their care (A-18), constituting 25% of the children then in the City's foster care system (A-8). Intervenors shelter, evaluate, plan for, supervise, educate, treat medically, psychiatrically and

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[1] References to "A" are to Petitioners appendix; "JA" to the appendix in the Court of Appeals on this appeal and "W" to the appendix on the prior appeal which confirmed the final Stipulation of Settlement.

mentally, and nourish the children entrusted to their care, whose parents cannot do so (W 1643-1849). These children included large numbers within and large numbers outside the plaintiff class (W 1647, 1715-16, 1728, 1735-6, 1740-1, 1749, 1755-6, 1766-7, 1781, 1797-8, 1828).

It was Intervenors who proceeded to make a record and advance arguments that the rights of the children in their custody and care required that the proposed stipulation be rejected. (JA 303-4) To that end, Intervenors filed 21 affidavits totalling 250 pages (W 1645-1900), 13 pages of formal objections and 62 pages of briefs and exhibits (JA 18-94).

Ultimately the District Court so found, holding that the proposed stipulation was "unacceptable on several levels" in light of Intervenors' objections, *Wilder* v. *Bernstein*, 645 F. Supp. 1292 at 1347 (S.D.N.Y. 1986), *aff'd* 848 F.2d 1338 (2d Cir. 1988), a finding omitted from the Petition here.

Only when faced with the record compiled by Intervenors did the City and plaintiffs recognize that Intervenors had raised substantial issues of the unconstitutionality of the proposed stipulation and its serious adverse effect on children's rights.

Lengthy negotiations then followed. As the District Court found in approving the final settlement:

> "It was around [Intervenors'] concrete proposals that all the parties subsequently negotiated, in open court, during lengthy sessions held through the fall of 1984" (645 F. Supp. at 1348).

The District Court found that Intervenor's succeeded in obtaining numerous substantial changes in the proposed stipulation (645 F. Supp. at 1348-1349; 725 F. Supp. at 1329, n.4, A-52). Indeed, Intervenor's assent to the final Stipulation as modified to meet virtually all of their objections was a weighty factor in the District Court's decision to approve it (645 F. Supp. at 1350) – another critical fact omitted from the Petition.

The City attempts to distinguish between the constitutional points raised by Intervenors and their "clinical concerns." However, Intervenors, and only Intervenors, successfully argued that the so called "clinical concerns" raised by Intervenors demonstrated that the settlement agreement proposed by the City and plaintiffs was adverse to the best interests of children in care and thus violated their rights under the 14th Amendment.

As the Intervenors contended before the District Court in August 1984:

> "The City and ACLU say the core issues in this case are equal access to care and religious issues. We disagree with that.
>
> "We think that in any case dealing with children and care the best interests of the child, each individual child, is the lodestar by which the Court and all the parties must be guided. . . When parents are unwilling or unable to take care of their children, the state, and by that I mean the state generically, here the City — can only step in and act as the parens patriae in the best interests of the child. That is the beginning, the end, and the middle. JA 179
>
> * * *
>
> "He is coming into care because the state must take care of him. The state can only act in the child's best interests. Your Honor put his finger on our constitutional argument, that the equal protection rights of the child were being violated. . . *Nobody addressed that issue except us.*
>
> "*It is the child's 14th Amendment rights that are being violated.*" JA 185. (Emphasis added).

In the end, the District Court made the following findings which were uncontested in the Court below and unchallenged here:

(1) "[T]he Court found the contributions made by the Intervenors were essential to the creation of the final Stipulation" 725 F. Supp. at 1329, A-51.

(2) Intervenors prevailed "in forestalling entry of the proposed stipulation negotiated by plaintiffs and the City" 725 F. Supp. at 1329, A-52.

(3) Intervenors "prevailed, through negotiations, in their proposals to modify the settlement to ameliorate the constitutional, clinical, and practical stumbling blocks they had identified in the original stipulation." 725 F. Supp. at 1329 (footnote omitted), A-52. "They succeeded in obtaining modifications in the initial settlement proposal on virtually every objection they raised." 725 F. Supp. at 1332, A-58.

(4) Intervenors "furthered the purposes of the civil rights statutes by facilitating the formation of a settlement which would safeguard the constitutional rights of the children in the City's care, while assuring that the child care system itself would remain focused on the overall best interests of the children entitled to the protection of the civil rights laws." 725 F. Supp. at 1331, A-57-8.

(5) Intervenors "consistently and forcefully articulated objections addressed to the constitutional and civil rights issues in this litigation." 725 F. Supp. at 1332, A-58

(6) Intervenors "helped to vindicate the civil rights of the children and families in the foster care system which they served, not just their own self interests." *Id.*

(7) Intervenors achieved "a 'material alteration of the legal relationship of the parties in a manner which Congress sought to promote'." *Id.* (citations omitted).

(8) "The contributions made by the intervenors were essential to the creation of a just and workable remedy, exactly the type of activity sought to be promoted by the civil rights statutes." 725 F. Supp. at 1331-2, A-58.

Finally, the City states that Intervenors had no legal interest at stake in the litigation, because "they had no axes to grind," were interested only in "the best interests of children in foster care" and they were "non-parties vis-a-vis the underlying constitutional claims in the lawsuit." Petition at p.4.

Intervenors, of course, had no axe to grind as to the underlying claims of racial and religious discrimination. With respect to relief, however, Intervenors had enormous axes to grind. *See* findings 1-8, *supra*. Intervenors also argued that the proposed settlement agreement violated the First Amendment rights of the children and their parents, (JA 23, 70-76, 133-36, 302-3, 308-9) as well as the Fourteenth Amendment rights of the children.[2]

Intervenors' stake in the litigation was to protect the constitutional rights of the 4600 children in their care, and for whom they stand in *loco parentis*, when threatened by the settlement originally put forward by plaintiffs and the City.

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[2] Footnotes 2 and 7 to the Petition disingenuously suggest that the City's payments to plaintiffs by agreement somehow impact Intervenor's right to fees for their critical contributions. Omitted are the facts that the District Court expressly found that the City did not pay plaintiffs for litigating against intervenors (725 F. Supp. at 1332, note 8, misprinted at A-58) and that Intervenors stipulated in open Court to seek no fees for enforcement activities short of actual litigation. In any event, this case has been remanded to the District Court to insure that there will be no duplication of fees. See p. 13 *infra*.

REASONS FOR DENYING THE WRIT

POINT I

THIS CASE RAISES NEITHER NEW ISSUES NOR SIGNIFICANT ISSUES

Here, the unchallenged findings of the District Court (p. 4-6, *supra*) demonstrate beyond cavil that Intervenors contribution was not only significant but pivotal to the outcome and altered the legal relationship of the parties in numerous and critical respects.

The decision below simply holds that an Intervenor who so vindicates the constitutional rights of those for whom it stands in *loco parentis* is entitled to fees for so much of that work as is non-duplicative of plaintiff.

Nothing in that holding is either new or a departure from prior law:

A. Once intervenors demonstrate a significant contribution by non-duplicative work, *Donnell* v. *United States*, 682 F.2d 240, 249 (D.C. Cir., 1982) *cert. denied*, 459 U.S. 1204 (1983), that resulted in a "material alteration of the legal relationship of the parties" *Texas State Teachers Assoc.* v. *Garland Independent School District*, 489 U.S. 782, 792-793 (1989), their right to counsel fees is assured. There is not a single case, and certainly none is cited by the City, where an intervenor whose independent activity prevailed in vindicating the rights of its clients or constituents was denied counsel fees.[3]

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[3] *Independent Federation of Flight Attendants* v. *Zipes*, 491 U.S. 754 (1989), relied upon by the City is utterly inapposite. It merely holds that an unsuccessful but blameless intervenor-defendant who violated no rights of plaintiff may not be compelled to pay legal fees to plaintiff when the intervention was not frivolous. Having violated no rights of plaintiffs, there was no liability for fees. Here, of course, Intervenors prevented the City from violating the rights of the children in Intervenors' care. (In *Rhodes* v. *Stewart*, 488 U.S. 1 (1988), the case was moot before judgment on the merits; in *Hewitt* v. *Helms*, 482 U.S. 755 (1987), the fee seeker lost on the merits; and *Kay* v. *Ehrler*, ___ U.S. ___, 111 S.Ct. 1435 (1991) merely held that a *pro se* litigant was ineligible for fees.)

B. The legislative history makes clear that Intervenors who vindicate constitutional rights may be awarded counsel fees (S. Rep. No. 1011, 94th Cong., 2d Sess. 4, *reprinted in* 1976 US Code Cong. & Admin. News 5908, 5912, n.4).

C. The Courts of Appeals have uniformly so held; *United States* v. *Board of Education of Waterbury*, 605 F.2d 573 (2d Cir 1979); *Morgan* v. *McDonough*, 511 F. Supp. 408 (D. Mass. 1981) *aff'd* 689 F.2d 265 (1st Cir. 1982); *Seattle School District No. 1* v. *State of Washington*, 633 F.2d 1338 (9th Cir. 1980), *aff'd* 458 U.S. 457 (1982).

In each of these cases the Intervenors to whom fees were awarded, like Intervenors here, asserted no organizational rights of their own, but rather the rights of their constituents.

The *Waterbury* Intervenors included many persons who had no children affected by the outcome.

The *Morgan* Intervenors were a committee to protect the rights of their clients, a group of public school students.

The *Seattle* Intervenors were even further removed from the children whose rights they advocated, being a group of disparate organizations some of whose members or constituents had children in the plaintiff school systems. Petitioner's attempt to distinguish *Seattle* in footnote 5 is, at best, a distinction without a difference.

Indeed, the nexus between Intervenors and their children is far closer here. Patently, had the absent parents done as Intervenors did, they would have been entitled to fees. Intervenors here stand in the shoes of the children's parents. A-18. Under New York law, Intervenors are the custodians of children in their care, New York Social Services Law §§ 383, 384, 384-a, 384-b. The New York Courts have repeatedly so held, *Matter of Spence-Chapin Adoption Services* v. *Polk*, 29 N.Y. 2d 196, 202-3 (1971); *Matter of JCCA v. Saunders*, 5 N.Y. 2d 222, 229 (1959).

The City and plaintiffs, the two parties who should have protected the rights of the children in Intervenors' care, had agreed on a settlement that violated their rights under the First and Fourteenth Amendments. Only Intervenors acted to protect those rights.

Intervenors right to fees for doing so stands on at least as firm, if not a better, footing then that of the Intervenors in the above cited cases. In the posture of this case it is indistinguishable from the status of the organization in *Mid-Hudson Legal Services, Inc.* v. *G & U, Inc.*, 578 F.2d 34, 37 (2d Cir 1978). That agency vindicated the rights of the farm-worker clients it was mandated to protect. Here, Intervenors protected the rights of the children they are mandated to protect.

In sum, the decided cases uniformly hold that, where, as here, a party prevails in vindicating the constitutional rights of its clients or constituents, it is entitled to legal fees under 42U.S.C. 1988.

The City contends Intervenors should not be awarded fees because they did not claim the City violated their rights. Petition at 9. What Intervenors claimed was that the City violated the rights of the children for whom they care as substitute parents by agreeing to and offering for court approval the initial flawed settlement. Intervenors prevailed on that claim and the settlement was modified to meet their objections. They are entitled to fees.

Since this case in no way expands the coverage of 42 U.S.C. § 1988, it will not let loose the dogs of litigation as the City prophesies. Petition at p. 10. As the Second Circuit so cogently pointed out, A15-6, Rule 24 of the Federal Rules of Civil Procedure will prevent the parade of horribles the City has dreamed up.

This case is particularly unlikely to stimulate litigation due to the fact that many intervenors had established rights pursuant to judgment to act as parties with respect to remedy. If *Waterbury*, *Seattle* and *Morgan* have not stimulated intervenor litigation over more than a decade, it is untenable to argue that this case will.

The City also argues that Intervenors did not need the incentive of fees to litigate in this case and quotes from the first opinion of the Court of Appeals, Petition at p. 12. That opinion was vacated and the unanimous affirmance of fees to Intervenors points out how essential fee recovery is to organizations whose constituencies are, as here, economically disadvantaged. A 18-19. As Intervenors pointed out in their Petition for Rehearing:

> "There is simply no way Intervenors could or would have paid legal fees for the years of litigation it took to correct the seriously flawed stipulation originally proposed by the City and plaintiff's counsel. Every dollar spent on legal fees would have been diverted from providing services to children in dire need, the only purpose of these agencies. None of these agencies could or would have spent substantial sums on this litigation instead of on child care. Indeed, one of their oft repeated objections to the original stipulation was its diversion of scarce financial resources from direct child care. JA 24, ¶ 12; JA 27, ¶ 22; JA 31, ¶ 40; JA 116, ¶ 2; W 1717, 1778."*

Moreover, the Courts of Appeals have long and unanimously held that:

> "Whether or not an action would have been brought in the absence of section 1988 is irrelevant."

Ackerly Communication v. *City of Salem, Oregon*, 752 F.2d 1394, 1397 (9th Cir. 1985) *cert. denied*, sub. nom. *County of Multinomah* v. *Ackerly Communications*, 472 U.S. 1028 (1985); *Sargeant* v. *Sharp*, 579 F.2d 645, 648 (1st Cir. 1978); *Milwe* v. *Cavouto*, 653 F.2d 80, 83 (2d Cir. 1981); *Gore* v. *Turner*, 563 F.2d 159, 164 (5th Cir. 1978); *Sable Communication of California* v. *Pacific Tel. & Tel.*, 890 F.2d 184, 193 (9th Cir. 1989); *Jones*

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* Citations contained in the quotation have been conformed to n. 1, *supra*.

v. *Wilkinson*, 800 F.2d 989, 991 (10th Cir. 1986), *aff'd*, 480 U.S. 926 (1987).

More recently, this Court has unanimously reached the same result. *Blanchard* v. *Bergeron*, 489 U.S. 87, 109 S.Ct. at 944 (1989).

POINT II

THERE IS NO CONFLICT AMONG CIRCUITS

As demonstrated in Point I, *supra*, in every case where the issue has been considered, intervenors who prevailed in vindicating the civil rights of clients or constituents have been awarded fees.

The City's attempt to manufacture a conflict among the circuits will not stand even casual scrutiny. *Donnell* v. *United States*, 682 F.2d 240 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1204 (1983) far from supporting the City, simply makes clear that intervenors, like plaintiffs, who make a substantial contribution are entitled to fees, but when the contribution is minimal no fee should be awarded. *American Booksellers Assoc, Inc.* v. *Hudnut*, 650 F. Supp. 324 (S.D. Ind. 1986) holds only that an intervenor who did virtually nothing is entitled to no fee.

Posada v. *Lamb County, Texas*, 716 F.2d 1066 (5th Cir. 1983) merely applies the *Donnell* reasoning to *plaintiffs* who made no substantial contribution: so much for the supposed greater scrutiny.

The "greater scrutiny" the City trumpets is simply the obvious point that intervenors must satisfy the Court that they did more than ride plaintiffs' coattails. Far from being in conflict with the decision below, *Donnell* emphasizes that intervenors who, like those here, make a divergent or independent contribution are entitled to fees, citing *Seattle*, 682 F.2d at 246 and n.12. The Court below expressly followed the *Donnell* formulation. (A-20)

Least tenable of all is the City's suggestion that the Court below ignored the question of whether Intervenors were plaintiffs or defendants and thus fell into conflict with other Circuits. (Petition p. 15).

In fact the Court below committed no such oversight. It addressed that very question:

> "[T]here is no reason why the present intervenors, whether they be styled intervenor-plaintiffs or intervenor-defendants, may not be prevailing parties for purposes of § 1988 (A-14).

Moreover, Intervenors made clear from the outset that they were neither plaintiffs nor defendants, insisting that they were "Non-Defendant Agencies" (JA 19, 33, 98, 179), who intervened solely with respect to relief. Not having discriminated, they clearly were not defendants. Similarly, they could not style themselves as plaintiffs since they were not involved in the issue of whether discrimination existed. Thus, perforce, they were Intervenors without sub-title. That circumstance does not affect their rights.

Finally, the City's assertion that the Fifth and Eleventh Circuits deemed the plaintiff or defendant label determinative (Petition p. 15) borders on the captious: *League of Unified Latin American Citizens* v. *Clements*, 923 F.2d 365 (5th Cir. 1991) turned not on any distinction between intervenor-plaintiffs and intervenor-defendants, but simply holds that a prevailing intervenor-defendant cannot recover against her equally prevailing named co-defendant. Similarly, *Reeves* v. *Harrell*, 791 F.2d 1481 (11th Cir. 1986) merely holds that an intervenor-plaintiff whose claim is frivolous is liable for fees to plaintiff — in the same way as an intervenor-defendant whose claim is frivolous, *see Independent Federation of Flight Attendants* v. *Zipes*, 491 U.S. at 760 (1989). If the claim is frivolous, liability follows regardless of label.

The labels of "plaintiff" or "defendant" control little when applied to intervenors. On this the circuits are unanimous. *Donnell* held that if intervenor-defendants contributed substantially they were entitled to fees. *Waterbury*, *Seattle* and *Morgan* held the same as to intervenor-plaintiffs.

POINT III

THE STANDARD SET BY THE COURT BELOW IS WORKABLE

In directing the District Court to determine the extent, if any, to which Intervenors work included efforts duplicative of plaintiffs, or was "attributable solely to advancing concerns other than civil rights violations" (A-22), the Court of Appeals created no unworkable standard. The separation of work addressed solely to non-civil rights concerns is akin to excluding "hours that were not 'reasonably expended,' " *Hensley* v. *Eckerhart*, 461 U.S. 424, 434-5 (1983), or determining the hours to be excluded to account for limited success, *Hensley* v. *Eckerhart*, *supra* at 436-7; *Texas State Teachers* v. *Gurland Independent School District*, 489 U.S. at 791 (1989).

Contrary to the City's claim (Petition, p.17), the Court of Appeals did not direct the District Court to make any decision based on Intervenors' motives. Quite the opposite, it held that where mixed motives exist, a prevailing intervenor may be compensated for efforts which advanced civil rights concerns (A-21).

In fact, the decision below, far from conflicting with *Texas State*, follows its directions in the analogous situation of a partially successful claimant. The District Court was instructed: 1) efforts in pursuit of civil rights remedies may be recovered; 2) efforts which furthered civil rights objections together with other concerns may be recovered; and in conclusion; 3) efforts duplicative of plaintiffs' or solely to advance non-civil rights concerns are not recoverable (A-21, 22).

There is nothing unusually complex, arcane or unworkable in that disposition. The District Court was left free to "exercise [its] equitable discretion . . . to arrive at a reasonable fee award, either by attempting to identify specific hours that should be eliminated or by simply reducing the award to account for" non-compensable efforts, *Texas State Teachers* v. *Garland Independent School District*, *supra* 109 S.Ct. at 1492. A decision which, on this point, so closely follows the direction of this Court is no grounds for granting certiorari.

CONCLUSION

The Petition for a writ of certiorari should be denied.

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Respectfully submitted,

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